TABLE OF CONTENTS

Page

JURISDICTIONAL STATEMENT 1

OPINION BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED 3

STATEMENT 6

CERTIFICATE OF SERVICE 26

APPENDIX A

Decision of Lower Court:

Alamo Exp., Inc., et al. v. United States, et al., 239 F. Supp. 694 ..... (A-1)

Interstate Commerce Commission Reports and Orders, MC-F-7882, Central Freight Lines, Inc.-Control-Inland Motor Freight Lines, Inc.:

Report and Order of Jan. 11, 1963, 90 M.C.C. 777 ..... (A-12)

Order of July 23, 1963 ..... (A-40)

Report and Order of Nov. 15, 1963, 93 M.C.C. 411, following ..... (A-42)

Second Report and Order of June 29, 1964, ... M.C.C. .... (A-43)

Order of October 20, 1964 ..... (A-57)

APPENDIX B

Interstate Commerce Commission General Rules of Practice ..... (B-1)

Applicable Sections of United States Code ..... (B-2)

STATUTES

	Page
5 U.S.C. §1001 et seq.	2
5 U.S.C. §1008(b)	9
28 U.S.C. §1336, 1398, 2321 et seq	2
28 U.S.C. §1253 and 2101(b)	3
49 U.S.C. §5	5, 6, 22
49 U.S.C. §5(2)	2, 6, 21
49 U.S.C. §5(2)(a)	27
49 U.S.C. §5(4)	6, 8
49 U.S.C. §5(7)	6
49 U.S.C. §16a	12
49 U.S.C. §17(6)	11, 12
49 U.S.C. §17(9)	3, 11, 12
49 U.S.C. §306(a)(1)	7
49 U.S.C. §306(a)(7)(B)	7
49 U.S.C. §310a(b)	7, 9

COMMISSION'S GENERAL RULES OF PRACTICE

Rule 1.101(a)(3)	13
Rule 1.101(e)	3, 9, 10
Rule 1.101(f)	4, 10, 11, 13

INDEX TO AUTHORITIES

Page

A. T. & S. F. Ry. Co. v. United States, 231 F. Supp. 422 (1964) 13

Baldwin v. Scott County Milling Co., 307 U.S. 478 (1939) 12

Butte v. A. & P. Co. v. United States, 290 U.S. 127 (1933) 13

Cassens Transport Co.—Purchase—Speedway Transport, 70 M.C.C. 370 19

MC-F-7882, Central Freight Lines, Inc.—Control—Inland Motor Freight, Inc. 6

MC-F-7682, Central Freight Lines, Inc.—Investigation of Control—Inland Motor Freight Lines, Inc. 6

Coldway Food Express, Inc.—Control and Merger, 87 M.C.C. 123 (130) 22

Erie R. R. Co. v. United States, 59 F. Supp. 748, 64 F. Supp. 162 (S. D. Ohio 1945) 12

Gilbertville Trucking Co. v. United States, 371 U.S. 115 9

Gillette Motor Transport, Inc.—Control—Voss (Div. 3, 1962), 90 M.C.C. 663 at 668 20

Hankison—Control—Mutual Trucking Co., 37 M.C.C. 617 22

Hart v. ICC, 226 F. Supp. 635 (U.S.D.C. Minn., 1964) 21

Herrin Transportation—Purchase—Mobile Express Co. (Ent. Comm., 1951), 58 M.C.C. 59 19

Hightower Box & Tank Co., Inc. v. Alabama, G.S.R. Co., 302 I.C.C. 20 12

Interstate Commerce Commission v. Cowan, 127 F. Supp. 247 12

M. P. McLean—Control: McLean Trucking Co.—Purchase—A.C.A. Motor Lines, Inc., 60 M.C.C. 475, 486 (1954) 21

Murphy Motor Freight Lines, Inc.—Control and Merger, 90 M.C.C. 535 20

INDEX TO AUTHORITIES (Continued)

Page

Navajo Freight Lines, Inc.—Purchase (Portion)—Strickland Transportation Co., 75 M.C.C. 713, sustained in Navajo Freight Lines v. United States, 186 F. Supp. 377 (1960) 14, 16

L. Nelson & Sons Transp. Co.—Control and Merger, 75 M.C.C. 45 22

Neptune Storage Inc.—Purchase—E. H. Warren Co., 80 M.C.C. 238, (1959) 21

Potashnick Truck Service, Inc.—Control—Bryant Lines, 5 M.C.C. 723 22

Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc., 80 M.C.C. 511 ..... 11, 14, 15

Sprague v. Woll, 122 F. 2d 128 (7th Cir. 1941), Cert. denied 314 U.S. 669 12

Stewart-Investigation of Operation, 87 M.C.C. 681, 697-8 19

United States v. Capital Transit Company, 325 U.S. 357 3

United States v. Detroit and Cleveland Navigation Company, 326 U.S. 236 3

United States v. Pierce Auto Freight Lines, 327 U.S. 515 3

Walker v. Central Freight Lines, Inc., 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964) Writ Denied, N.R.E. 5, 10, 11

Wilson Freight Forwarding Co.—Purchase—Hammel, 90 M.C.C. 41, 43, (1962) 16

Yellow Transit Freight Lines, Inc.—Purchase (Portion)—Inland Freight Lines, Inc. (Frank Brackney, Receiver) 65 M.C.C. 775 ..... 7, 8, 11, 14

Ziffrin Truck Lines, Inc.—Merger, 37 M.C.C. 33, 38 22

G. B. Zigler Co., 265 I.C.C. 539 12

SUPREME COURT OF THE UNITED STATES

ALAMO EXPRESS INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., and SOUTH-WESTERN MOTOR TRANSPORT, INC., *Appellants*

vs.

THE UNITED STATES OF AMERICA, THE INTER-STATE COMMERCE COMMISSION and CENTRAL FREIGHT LINES, INC., W. W. CALLAN and INLAND MOTOR FREIGHT LINES, INC., *Appellees*

On Appeal From No. 3485 in the United States District Court for the Western District of Texas, San Antonio Division

Jurisdictional Statement

Appellants appeal from the judgment of the United States District Court for the Western District of Texas, entered May 18, 1965 pursuant to decision of the three-judge district court of March 20, 1965, upholding as valid orders of the Interstate Commerce Commission sought to be set aside, affirming such orders of the Commission, and dissolving the temporary injunction theretofore issued by such court against giving effect to such orders.

OPINION BELOW

The opinion of the District Court for the Western District of Texas, San Antonio Division, is reported in 239 F. Supp. 694. The first report and order of the Interstate Commerce Commission by Division 3, of

January 11, 1963, is reported in 90 M.C.C. 777. The order of the Commission by Division 3, acting as an Appellate Division of July 23, 1963, is unreported. The report and order of the Commission on Reconsideration, by Division 3, acting as an Appellate Division, of November 15, 1963, is reported in 93 M.C.C. 411. The Second Report of the Commission on Reconsideration, by Division 3, acting as an Appellate Division, of June 29, 1964, is reported in 97 M.C.C. 249. The order of the Commission by Division 3, acting as an Appellate Division, of October 20, 1964 is unreported. Copies of such opinion, reports, and orders are attached hereto as Appendix A.

JURISDICTION

This suit was brought under 28 U.S.C. §1336, 1398, 2321, et seq., and 5 U.S.C. §1001 et seq., to set aside related orders of the Interstate Commerce Commission approving and authorizing under 49 U.S.C. §5(2)(a) the acquisition of control through management and ownership of the capital stock of one motor carrier by another. The opinion of the District Court was dated March 20, 1965, and was considered by Appellants as self-executing as to judgment. However, a judgment in conformity therewith was entered May 18, 1965. Notice of Appeal was filed in that court on May 18, 1965 and a Corrected Notice of Appeal (to give effect to the judgment of May 18, 1965) was filed June 7, 1965, so that the Notice was timely filed. A Supplemental Notice was given on June 16, 1965 to indicate that Alamo Express, Inc. is a party to the appeal, so that the appellants are identical with the

plaintiffs below. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States v. Capital Transit Company*, 325 U.S. 357; *United States v. Detroit and Cleveland Navigation Company*, 326 U.S. 236; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515.

QUESTIONS PRESENTED

1. Whether the order of the Commission of July 23, 1963 was a final order, as defined in 49 U.S.C. §17(9).

2. Whether the jurisdiction of the Commission in MC-F-7882 was terminated by the entry of the order of July 23, 1963, though it may have continued in MC-F-7682.

3. Whether the order of the Commission of June 29, 1964 waiving Rule 1.101(e) of the Commission's General Rules of Practice and permitting the filing of a petition for reconsideration by applicants—respondents in MC-F-7882, as well as MC-F-7682, was in excess of statutory authority, limitations, and jurisdiction.

4. Whether the order of the Commission of June 29, 1964 reconsidering the proceeding in MC-F-7882 was in excess of statutory authority, limitations, and jurisdiction.

5. Whether the order of the Commission of June 29, 1964 permitting the filing of a petition for reconsideration by applicants—respondents in MC-F-7882

was in excess of statutory authority, limitations, and jurisdiction, and constituted an abuse of discretion because contrary to Rule 1.101(f) of the Commission's General Rules of Practice prohibiting successive petitions for reconsideration on substantially the same grounds.

6. Whether the orders of the Commission of June 29, 1964 and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable split-off of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and, as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant.

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas, Texas.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law.

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines, Inc., Southwestern Motor Tran-

sport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines, Inc. that it will be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled, although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the split-off intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application.

STATEMENT

Central Freight Lines, Inc., a motor common carrier, herein called Central, and W. W. Callan, controlling Central as its principal stockholder and chairman of its board of directors, unlawfully acquired control and management of Inland Motor Freight Lines, Inc., also a motor common carrier, herein called Inland, contrary to Sec. 5, Interstate Commerce Act, 49 U.S.C. §5. Such is the finding and conclusion of the Interstate Commerce Commission, herein called Commission, in each of the three reports of the Commission, by Division 3, of January 11, 1963, November 15, 1963, and June 29, 1964, and such finding and conclusion has not been attacked.

The Commission instituted its proceeding in MC-F-7682, *Central Freight Lines, Inc.—Investigation of Control—Inland Motor Freight Lines, Inc.* under 49 U.S.C. §5(7) to determine whether the control or management of Inland in a common interest with Central may have been effectuated and may be continuing in violation of 49 U.S.C. §5(4).

Before the finality of MC-F-7682 and while it was pending after hearing, the application in MC-F-7882, *Central Freight Lines, Inc.—Control—Inland Motor Freight Lines, Inc.* was filed seeking authority under 49 U.S.C. §5(2) for Central to acquire control of Inland through purchase of its outstanding capital stock, and for Callan to acquire control of Inland through the same transaction. Appellants Red Arrow Freight Lines, Inc., herein called Red Arrow, and Brown Express, Inc. supported the position of the Commis-

sion in MC-F-7682, and all appellants opposed the transaction in MC-F-7882. The proceedings in MC-F-7682 and MC-F-7882 were disposed of by the Commission in the same reports and orders.

After the filing of the application in MC-F-7882, Central sought and was granted temporary authority to control Inland through management under 49 U.S.C. §310a(b).

Inland, a Texas corporation, was formerly known as J. H. Robinson Truck Lines, Inc., such Inland entity being a mere change in corporate name. Prior to the change in corporate name, Inland leased its intrastate rights corresponding to the interstate rights now held by it to Alamo Express, Inc. and Southwestern Motor Transport, Inc., herein called SMT, on long-term bases. Alamo Express and SMT registered such intrastate rights under the second proviso of 49 U.S.C. §306(a)(1) (now succeeded by 49 U.S.C. §306(a)(7)(B) under the terms of which Certificates of Registration are issuable) and have engaged in operations in interstate and foreign commerce. This is the manner by which there was a split-off of interstate and corresponding intrastate operating rights. Thereafter, Inland went into state receivership and J. H. Robinson acquired the reversionary interest in such rights so leased to Alamo Express and SMT. 90 M.C.C. 777. See also *Yellow Transit Freight Lines, Inc. — Purchase (Portion)—Inland Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775. Such rights of J. H. Robinson, deceased, passed to his widow, Mrs. J. H. Robinson. See report of June 29, 1964, 97 M.C.C. 249.

Three separate reports and orders, and two separate orders, were issued by the Commission, by Division 3, as pertinent herein:

(1) On January 11, 1963, 90 M.C.C. 777, it (a) denied the application in MC-F-7882 upon the basis of the Commission's prior holdings (involving the same Inland carrier) in *Yellow Transit Freight Lines, Inc. — Purchase — Inland Motor Freight Lines*, 65 M.C.C. 775, that where, as here, there had been a severance of interstate and corresponding intrastate rights, theretofore operated by a single carrier, which might or had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce over the same highways and between the same points, the proposal may not be sanctioned in the public interest;[1] (b) found in MC-F-7682 the control or management of Inland in a common interest with Central to have been effectuated in violation of 49 U.S.C. §5(4), but that such violation terminated with the grant of temporary authority, and directed respondents "to dispose of all of their interest, direct or indirect, in Inland or in any of its stock."

(2) Thereafter, applicants — respondents filed a petition for reconsideration of the report and order of the Commission of January 11, 1963 in both MC-F-7882 and MC-F-7682, and appellants replied. By order of July 23, 1963, the Commission (a) found that the conclusions in the report of January 11, 1963 "with

[1]In view of its conclusion reached, the Commission therein held that whether some modification of the operating authority of Inland would be in order on the basis that certain portions are dormant need not be determined.

respect to No. MC-F-7882 are based on adequate findings supported by the record, and that there has been presented no error of fact or law with respect to the findings and conclusions therein which warrant reconsideration"; (b) ordered that MC-F-7682 be reopened for reconsideration on the present record; (c) ordered that said petition be denied in all other respects; and (d) ordered that the effective date of the order of January 11, 1963 in MC-F-7882 be postponed pending further order therein, for the obvious purpose of ultimately making the orders in MC-F-7682 and MC-F-7882 simultaneously effective.

(3) By report and order of November 15, 1963, 93 M.C.C. 411, the Commission, on the basis of *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, modified the divestiture requirement of MC-F-7682 to provide that "respondents should be free to employ any lawful means to prevent further violation upon the termination of temporary authority in No. MC-F-7882,[1] rather than be limited exclusively to divestiture." No modification was made herein of the prior denial in MC-F-7882, but such denial was final by the order of July 23, 1963.

(4) On January 14, 1964, after the time for filing of a petition for reconsideration had expired under Rule 1.101(e) of the Commission's General Rules of Practice, applicants—respondents filed a petition for waiver of Rule 1.101(e), which included a petition for extraordinary relief, for reconsidera-

[1]The temporary authority in MC-F-7882 would have expired simultaneous with the effectiveness of the order on permanent authority in MC-F-7882. 49 U.S.C. 310a(b) as modified by 5 U.S.C. §1008(b).

tion, for continuance of temporary authority, and for approval of MC-F-7882, to which appellants replied. The petition was a successive one, violative of Rule 1.101(f) of the Commission's General Rules of Practice, but no relief from that rule was sought nor granted. The Commission by report and order of June 29, 1964, 97 M.C.C. 249, the report being written by Commissioner Murphy who was *not* a member of Division 3 participating in the report and order of January 11, 1963, 90 M.C.C. 777, waived the provisions of Rule 1.101(e), accepted for filing the petition of applicants — respondents for reopening and reconsideration in MC-F-7882, reopened the proceedings in MC-F-7882 for reconsideration on the present record, and upon reconsideration granted and authorized the transaction in MC-F-7882. It found that (a) applicants contend that a final decision on the litigation as to Central's control of Alamo Express, Inc. is anticipated in 1964, inferring that it will favor Central's control; (b) applicants contend there is no market for the interests in Inland unlawfully acquired; (c) Central is willing to have its control of Inland conditioned upon the elimination of rights of Inland which are duplicative of those of Central, and of the leased intrastate rights of SMT and Alamo Express, but the Commission did not so condition the grant; (d) Central was negotiating for the reversionary rights of the split-off intrastate rights coextensive with Inland's interstate rights;[1] (e) the denial in MC-F-7882 was

[1]The matters found in (a)-(d), inclusive were not based on evidence. Further, (a) is clearly erroneous, as subsequently in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964) the Supreme Court of Texas denied an application for a writ of

predicated upon *Yellow Transit*, 65 M.C.C. 775, whereas *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, not previously considered by the Commission, is dispositive of MC-F-7882, because in *Shein's* the separation was by strangers to the transaction, as here, whereas in *Yellow Transit* the separation was by "parties to the proceeding involved."[2] The factual error hereof is subsequently pointed out.

(5) Petitions for reconsideration of the report and order of June 29, 1964, 97 M.C.C. 249, were filed by appellants, to which applicants—respondents replied and by order of October 20, 1964 such petitions were denied.

The order of July 23, 1963 finally, and in all respects except as to its effective date, disposed of MC-F-7882 by denial 49 U.S.C. §17(9). The report and order of June 29, 1964 undertaking to grant reconsideration on the basis of a successively filed petition, violative of Rule 1.101(f) of the Commission's General Rules of Practice and which rule was not waived nor sought to be waived, is a nullity. 49 U.S.C. §17

---

error, No Reversible Error, which decision denies to Central the control of Alamo Express. (c) above was not followed in such report and order.

[2]The Commission erroneously concluded:

> "Moreover, approval of the control case is a step in the direction of a possible permanent reunification of a significant part of the severed rights of Inland, and would thus be an improvement over the status quo."

The Commission's own report demonstrates that this was based upon petition representations, not evidence, and the fallacious nature thereof is demonstrated by *Walker v. Central Freight Lines, Inc.* 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), error refused, N.R.E., holding to the contrary of the implication of the representations.

(6). While this appears to be a matter for initial determination by this court, the matter has been previously determined to this effect by the Commission. *G. B. Zigler Co.*, 265 I.C.C. 539; *Hightower Box & Tank Co., Inc. v. Alabama, G.S.R. Co.*, 302 I.C.C. 20. Such order of July 23, 1963 was a final and appealable order under 49 U.S.C. §17(9). *Interstate Commerce Commission v. Cowan*, 127 F. Supp. 247. While conceivably the Commission *on its own motion*, might reopen a proceeding otherwise final, the vice herein is in the reopening after finality upon the successive petition of a party, violative of its own rules.

The District Court erroneously found that the Interstate Commerce Act, unlike the National Labor Relations Act, "gives the Commission a continuing jurisdiction over its orders, thereby allowing it to modify and even rescind a great number of them at any time" and that there is no "cut-off date, after which the Commission could not rescind or modify its orders," citing as authority *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d 128 (7th Cir. 1941), Cert. denied 314 U.S. 669, and *Erie R.R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S.D. Ohio 1945); but each of these cases involved a rehearing upon the basis of changed conditions under 49 U.S.C. §16a (recodified in 1940 as 49 U.S.C. §17(6)) and none give consideration to the specific language of such statute as herein applicable:

> "Such applications (referring to applications for rehearing, reargument or reconsideration) shall

be governed by such general rules as the Commission may establish."

Here, the Commission has established a rule applicable in this case which makes the order of July 23, 1963 a final order. Rule 1.101(a)(3) of the Commission's General Rules of Practice provides in part:

> "In proceedings . . . in which a division reverses, changes or modifies a prior decision by a hearing officer . . . a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and *with administrative* finality." (Emphasis added.)

In making the order of July 23, 1963 Division 3 acted in an appellate capacity and with administrative finality.

Herein, we have a successive petition violative of Commission Rule 1.101(f), not waived nor sought to be waived. Such cases so cited by the District Court are all predicated on *Baldwin*, which has been cited on this proposition only one other time by courts, in *A.T.&S.F. Ry. Co. v. United States*, 231 F. Supp. 422 (1964), wherein the Commission reopened upon its on volition. On the other hand, under *Butte v. A. & P. R. Co. v. United States*, 290 U.S. 127 (1933), the Commission may not, violative of its own rules, reopen a final proceeding on the motion of a party to correct an error of fact or law.

The Commission has long followed the rule that where, under the circumstances such as here present,

when there has been a separation of interstate and intrastate operating rights in such a manner that two resulting substantially identical interstate operations result, and a proposal is then made to sell the interstate certificate, in the absence of a public need for additional service, or a showing that the requirements of the shipping public are not being adequately met by existing carriers, the proposed transaction will be denied. *Navajo Freight Lines-Purchase (Portion)-Strickland Transportation Co.*, 75 M.C.C. 713, sustained *in Navajo Freight Lines v. United States*, 186 F. Supp. 377 (1960); *Southern Pacific Transport Co.-Purchase—Inland Motor Freight*, embracing *Yellow Transit Freight Lines, Inc.—Purchase (Portion)—Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775.[1]

No evidence was offered herein with respect to a public need for additional service nor that the requirements of the shipping public are not being adequately served, to the exclusion of Inland under the control of Central.

The reversal by the Commission, Division 3, of June 29, 1964 was predicated upon the finding that in the "prior decisions" herein, no consideration was given to *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc. supra:*[1]

> "In that case, as here, the separation of intrastate from interstate rights resulted in the creation of two interstate rights, where previously

[1]Involving the identical operating rights herein sought to be controlled.
[1]*Shein's Exp.–Purchase–Leo Smith Forwarding Co., Inc.*, 80 MCC 511 (Div. 4, Sept. 11, 1959).

one existed. It was established that none of the parties before the Commission in the *Shein's* case were responsible for the creation of the two rights. In the instant proceedings, the action of Inland in leasing its intrastate operating rights to Alamo and Southwestern was dictated by Robinson, who long since severed his connection with Inland. No representative of Robinson's estate, nor Alamo or Southwestern are here before the Commission as applicants and approval of the *control* case will not result in any benefit to any of them. In the absence of evidence to the contrary, or of any misconduct by Alamo or SMT, or their stockholders, the Commission has no authority to require them to discontinue operations under the proviso. *Shein's Exp—Purchase—Leo Smith Forwarding Co., Inc., supra.* The evidence here does not establish that either those persons who controlled Inland both prior to and following the sale of its stock to Gillen, or Central, conspired with Robinson to effect a separation of Inland's intrastate from its interstate operating rights."

The majority in *Shein's* concluded on this issue:

"Applicants herein are not to be penalized because the action of Smith-sons and the members of the Smith family in disposing of Ontario has resulted in the creation of two interstate operations where before there was only one. The situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved."

Thus, the Commission herein would ignore the resulting *vice* and permit of the creation of duplicate

operating rights, thereby nullifying the principle of the Commission that duplicate operating rights could not be created without proof of need for additional service.

But *Shein's* stands alone in a wilderness surrounded by a plethora of cases to the contrary, including the very *Yellow Transit* case which was a basis of the prior denial. Interesting enough is the fact that *Shein's* has been cited by the Commission in only two subsequent decisions, although it was decided in 1959, and both of those citations (87 M.C.C. 71 and 90 M.C.C. 668) are on issues other than that for which it is cited herein—interestingly enough, reaching a contrary decision to that reached by Division 3 in its order of June 29, 1964 on the issue of dormancy. The report accepts *Shein's* on the abrogation of the split-of-rights doctrine and ignores it on the dormancy issue. It would appear that if it is the law, it should be fully applied.

Furthermore, the split-of-doctrine rights so uniformly followed by the Commission has been continued to be followed subsequent to *Shein's* (1959) as is evidenced by the representations of the Commission to the court in *Navajo Freight Lines, Inc. v. United States*, 186 S. Supp. 377 (1960), as well as the subsequent decision in *Wilson Freight Forwarding Co.—Purchase—Hammel*, 90 M.C.C. 41, 43, (1962).

Shein's, standing alone, does not negate the general rule, but only would apply a different rule than that applied in "the *Courier* case, and cases cited therein." The quoted portion immediately before is the *sole*

basis for distinction, and therein the Commission did not undertake to overrule the other long line of cases, but only "the cases in *Courier* case, and cases cited therein", as is clearly seen at 80 M.C.C. 515. For example, it did not overrule nor negate the application of the *Yellow Transit* case which is directly applicable herein.

The Commission erred in finding with respect to applicants—respondents contention that Division 3 in the report and order of January 11, 1963 relied on the *Courier case*, 45 M.C.C. 688 in denying the application in MC-F-7882. The fact is that Division 3 in the report and order of January 11, 1963, relied upon the *Yellow Transit* case, 65 M.C.C. 775 in denying such application, and the *Courier* case is merely cited incidentally in the *Yellow Transit* case. In the *Yellow Transit* case, the vendor was a court appointed receiver, Brackney, as a matter of law a representative of the creditors of the bankrupt estate of Inland, a stranger to the separation of the intrastate and interstate operations, and the purchaser was *Yellow Transit*, a stranger to the separation of the intrastate and interstate operations. Yellow Transit in that transaction, stood in the same shoes as does Central in this transaction, a stranger to the transaction. The corporate entity, Inland, was involved in both transactions, but in the *Yellow Transit* transaction the sale was contemplated by Brackney, as receiver, an appointee of a State District Court for the benefit of creditors in a receivership proceeding. Brackney therein was no more the representative of Robinson than is Gillen in the instant transaction. Therefore,

on the matter of application of the split-of-rights doctrine the facts are identical and on all-fours with the factual situation involved in *Yellow Transit.*

Similarly, the District Court erred in assuming that the *Yellow Transit Case,* 65 M.C.C. 775, differed from the facts in MC-F-7882 as to the guilt of the parties as to the split-off doctrine. This factual error resulted in the District Court finding a basis for distinction in the application of the split-off doctrine in MC-F-7882 from that applied in *Yellow Transit,* 65 M.C.C. 775.

The orders complained of are further arbitrary, capricious, and void because total dormancy existed as a matter of law. The report of June 29, 1964 correctly found:

> "The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleadings here considered and will not be further discussed."

Clearly, therefore, from December 1, 1957 until terminated by the grant temporary control authority on September 5, 1961 Central and Callan were affiliated with each other within the meaning of Sec. 5(6) of the Interstate Commerce Act; and the control or management of Inland, or the power to control or manage such carrier, in a common interest with Central did exist and continued until terminated by the grant of such temporary control authority on September 5, 1961. In consequence thereof, there was a dor-

mancy in the lawful operation of Inland during such interim December 1, 1957 until September 5, 1961. See *Stewart-Investigation of Operations*, 87 M.C.C. 681, 697-8. Since there was a total dormancy of lawful operations by Inland, the control of the involved operating rights is not capable of being lawfully transferred in accordance with the precedents of the Commission against the transfer of dormant lawful operating rights, in the absence of a showing of a genuine need for the reactivation thereof. *Herrin Transportation-Purchase-Mobile Express Co.* (Ent. Comm., 1951), 58 M.C.C. 59.

It is immaterial that on and after September 5, 1961 the extent of the operations such as have been conducted have been lawful; those operations are immaterial in determining the dormancy existing herein as a matter of law, because operations conducted subsequent to the purchase agreement are entitled to little or no weight. *Cassens Transport Co.—Purchase—Speedway Transport*, 70 M.C.C. 370.

Further, the findings in the report of January 11, 1963 are that in the period prior to the grant of temporary authority on September 5, 1961, Inland performed only limited transportation, not making full utilization of its operating rights; nevertheless, the report of June 29, 1964, without making findings contrary to those in the report of January 11, 1963, concluded that there was no basis for a finding of dormancy in respect of portions of the rights of Inland. This latter finding, and the action of the Commission in ultimately approving MC-F-7882 without

conditioning the approval upon cancellation of the non-operated rights, was arbitrary, capricious, and void, as contrary to the Commission's precedents. *Murphy Motor Freight Lines, Inc.—Control and Merger*, 90 M.C.C. 535.

Even the *Shein's* case, so heavily relied upon by Division 3 and the report to June 29, 1964, required cancellation of the non-operated routes. *Gillette Motor Transport, Inc.-Control-Voss* (Div. 3, 1962), 90 M.C.C. 663 at 668 follows *Shein's* on the requirement for cancellation in this regard.

The District Court summarily disposed of this issue at two points in its opinion by merely concluding that the Commission's finding of no dormancy in the operation of Inland is supported by substantial evidence, without specifying the reasoning upon which such conclusion is based. The District Court failed to reason its failure to find total dormancy as a matter of law, or the partial dormancy as a matter of fact.

The violation of law in acquisition of control, in of itself, required the denial in MC-F-7882, and failure to so find constituted the orders complained of as arbitrary, capricious, and void. In the report of January 11, 1963, 90 M.C.C. 777, Division 3 found that unlawful control of Inland by Central and Callan had been effectuated in a common interest with Central, and that such was willful, because of the insolvency of Inland, its lack of adequate facilities, personnel and management to conduct efficient motor carrier operations, it was found that the violations were not in such disregard of the Interstate Commerce Act as

to warrant a conclusion that Central is unfit to acquire control of Inland. However, because of the fact that Division 3 in the report of January 11, 1963 otherwise found that the transaction in MC-F-7882 would not be consistent with the public interest, no petition for reconsideration with respect to such report of January 11, 1963 was filed by appellants as to the finding that the violations were not such as to render Central unfit. The report of November 15, 1963, 93 M.C.C. 411, did not deal with that issue. Hence, the issue of Central's fitness in connection with the application in MC-F-7882 was presented for answer for the first time in the petition for reconsideration of the report of June 29, 1964, and overruled in the order of October 20, 1964.

The Commission has repeatedly taken the position that unlawful operations bear on whether a transaction under 49 U.S.C. §5(2) is consistent with the public interest. *Neptune Storage Inc.—Purchase—E. H. Warren Co.*, 80 M.C.C. 238, (1959); *M. P. McLean—Control: McLean Trucking Co.—Purchase—A.C.A. Motor Lines, Inc.*, 60 M.C.C. 475, 486 (1954); *Hart v. ICC*, 226 F. Supp. 635 (U.S.D.C. Minn., 1964).

In the report of Division 3 of June 29, 1964 it was correctly found:

> "The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleading here considered and will not be further discussed."

In fact, the position of applicants-respondents through-

out was one of admission of the common control and management with a mere shrug of the shoulders. It was tantamount to an admission of such flagrancy as not to warrant disregard by the Commission. Central and its officers treated contemptuously with the jurisdiction of the Commission under 49 U.S.C. §5 and after having consulted with representatives of the Interstate Commerce Commission ignored their advice with respect to the requirements in the premises and the application of §5 to the issued involved.

For the first time, in *Potashnick Truck Service, Inc. Control-Bryant Truck Lines*, 5 M.C.C. 723, the Commission pointed out that the time for "leniency" in the enforcement of unlawful acquisition had passed. Thereafter, it treated with the violation in *Ziffrin Truck Lines, Inc.-Merger*, 37 M.C.C. 33, 38, and held that the violation of unlawful acquisition therein was not a bar because the violation occurred prior to *Potashnick* case, supra. *Hankison-Control-Mutual Trucking Co.*, 37 M.C.C. 617, accords with the *Potashnick* case, supra. In many cases thereafter the Commission denied Sec. 5 applications because of the unlawful acquisition involved. The general rule of the Commission appears to be as announced in *Coldway Food Express, Inc.-Control and Merger*, 87 M.C.C. 123 (130- to the effect that where the evidence shows a reckless and flagrant disregard for the Commission's authority, such violation of the law should not be rewarded or permitted to continue. Compare *L. Nelson & Sons Transp. Co.-Control and Merger*, 75 M.C.C. 45. The approval of the instant transaction was to "bless" the "reckless and flagrant disregard

for the Commission's authority", and does not comport with the general rule announced by the Commission.

On the other hand, it is recognized that the Commission has held that past violations of the Act, though properly to be considered in determining the fitness of an acquiring party applicant in a Sec. 5 proceeding, is not an absolute bar to approval of such an application, particularly if the transaction otherwise is shown to be consistent with the public interest. However, the Commission cases applying this rule have been instances wherein the violation was of safety regulations, was in another proceeding, or where there were extenuating or mitigating circumstances. In no case found has the rule as herein applied by Division 3 been applied by the Commission where there was a reckless and flagrant flaunting of the Commission's jurisdiction.

The burden of statutory proof was on the applicants in MC-F-7882 to establish, among other things:

(1) The transaction is consistent with the public interest.

(2) The effect of the proposed transaction upon adequate transportation service to the public.

(3) The total fixed charges resulting will not burden Central or Inland.

(4) The interest of carrier employees will not be affected.

(5) Full utility has been made of all involved operating rights.

The record before the Commission was silent with respect to these requisite matters of proof.

While consistency with the public interest is the ultimate to be established in a Sec. 5 proceeding, applicants did not undertake to show the effect which the grant of this application would have upon the public generally in the rendition of transportation service to or from Central points or to or from Inland points, nor did they undertake to establish the manner by which operations would be conducted in the future.

Applicants wholly failed to establish the effect which the proposed transaction would have upon adequate transportation service to the public.

No showing by applicants was made as to the effect of total fixed charges resulting, nor as to the interest of employees.

On the contrary, appellants made a substantial showing of resulting material ill-effect from the grant of MC-F-7882, that Inland had not been a formidable competitor until controlled by Central, that Central is an aggressive and substantial carrier and affords substantial competition, and that existing carriers have the ability to transport such involved tonnage.

No evidence was offered by applicants bearing upon the effect of the proposed transaction upon adequate transportation service to the public, other than the

testimony of Mr. Callan that he would be able to increase the tonnage of Inland. The increase in tonnage is not necessarily the guarantor of consistency with the public interest, nor does it result in bettering or otherwise assuring adequate transportation service to the public; on the contrary, as is shown by the affirmative evidence of appellants, the grant of this application would have a material ill-effect upon the operation of appellants and the service which they are now rendering to the public in the territory involved.

The refusal of the Commission to find that applicants failed to offer evidence and sustain the statutory burden of proof bearing upon the effect of the proposed transaction upon adequate transportation service to the public renders the orders complained of as arbitrary, capricious, and void.

The District Court summarily disposed of this issue by finding "that the Commission's finding approving the transaction is consistent with the public interest is supported by the record, and was not arbitrary, unreasonable nor an abuse of discretion" without giving any suggestion as to the basis for such conclusion.

Appellants are entitled to have the orders in MC-F-7882 of June 29, 1964 and October 20, 1964 annulled, enjoined, cancelled and set aside, and to permanently enjoin appellees from giving effect thereto.

Respectfully submitted,

REAGAN SAYERS
303 Century Life Bldg.
Fort Worth, Texas 76102

EWELL H. MUSE, JR.
415 Perry Brooks Bldg.
Austin, Texas 78701
Counsel for Appellants

RAWLINGS, SAYERS, SCURLOCK & EIDSON
Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in the District Court by depositing a copy properly addressed with proper postage affixed in the U.S. mail.

Dated at Fort Worth, Texas, this 14th day of July, 1965.

_____

Reagan Sayers

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANONIO DIVISION

CIVIL ACTION NO. 3485

ALAMO EXPRESS, INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., AND SOUTHWESTERN MOTOR TRANSPORT INC., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION, CENTRAL FREIGHT LINES, INC., W. W. CALLAN, AND INLAND MOTOR FREIGHT LINES, INC., Defendants

Before BROWN, Circuit Judge, United States Court of Appeals, SPEARS, Chief Judge, District Court, and SUTTLE, District Judge.

SUTTLE, District Judge.

Plaintiffs brought this action to set aside, annul and enjoin orders of the Interstate Commerce Commission granting authority under Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. §5(2)(a), to CENTRAL FREIGHT LINES, INC., to acquire control of INLAND MOTOR FREIGHT LINES, INC., through purchase of capital stock, and in turn to W. W. Callan, controlling stockholder of Central, by virtue of the transaction. Their main complaint is that

after they had won several prior rounds before the Commission as protestants to the Defendants' application for control, the Commission suddenly reversed itself and held against them and granted the orders in question to Defendants. Plaintiffs attack the final orders as being arbitrary, unsupported by the evidence, and in excess of the authority granted to the Commission by Congress. While the course of the litigation has been long, complex, and at times uncertain, we find nothing in the record to justify a reversal of the Commission's Orders, or a remand to it for any further consideration.

The main issue through the Commission proceedings ultimately came to be whether or not the split-off or separation of intrastate operating rights from interstate rights by INLAND to ALAMO and SOUTHWESTERN should result in denial of CENTRAL and CALLAN'S application to control INLAND. The separation of intrastate from interstate rights took place as follows: Blake Gillan, presently the principal stockholder of INLAND, acquired the capital stock of INLAND from James S. McNamara in December, 1957. McNamara had obtained the stock in early 1956 from J. H. Robinson, who prior thereto caused INLAND to lease its Texas intrastate rights to SOUTHWESTERN and ALAMO on long-term leases. Thereafter, Robinson personally acquired the reversionary interest in the rights leased to Alamo and Southwestern with the approval of the Railroad Commission of Texas. Since Robinson's death these reversionary interests have belonged to Robinson's Estate. SOUTHWESTERN and ALAMO are using

the described leased intrastate rights for the performance of interstate operations, under the "grandfather" clause of Section 206(a)(7) of the Act. The leased intrastate rights in question parallel most of INLAND'S certificated interstate rights. The plaintiffs contended, with success until the orders in question were granted, that this split-off contravened the policy of the Commission of declining to approve transactions where the severance of interstate and corresponding intrastate rights, previously operated by a single carrier, resulted in the creation of two rights and two operations in the place of one. The Commission eventually decided that the situation presented by the instant fact situation was controlled by an exception to this policy which relieved "non-offending" parties to the split-off of the prohibition, and approved the Defendants' applications.

HISTORY OF THE PROCEEDINGS

In October, 1960, the Commission on its own motion instituted an investigation under Section 5(7) of the Act to determine whether the control or management of INLAND had been effectuated by CENTRAL and CALLAN, principal stockholder and chairman of Central's Board of Directors. This case, Number MC-F-7682, is known as the Investigation Case.

In May, 1961, CENTRAL and CALLAN filed application under Section 5 of the Act to acquire control of INLAND through purchase of its capital stock. This case, Number MC-F-7882, is known as the Control Case.

In the Control Case, an application under Section

210(a)(b) of the Act for temporary control by CENTRAL of INLAND through management was approved by Commission Order on September 5, 1961. Because of common facts and issues, the Commission proceeded to dispose of both the control and investigation proceedings on the same record and in reports combining the actions.

In its first report, January 11, 1963, the Commission concluded that the control and management of INLAND in a common interest with CENTRAL had been effectuated and was in violation of Section 5(4) of the Act and had continued until September 5, 1961, when terminated by the grant of temporary control authority. The violation, however, was found not to be such as to preclude CENTRAL as being unfit to control INLAND, nor so aggravated as to prevent approval in the control case, *if it could otherwise be found to be consistent with public interest.* Because of the split-off, however, the application in the control case was denied and an order entered directing divestiture of stock in INLAND by the defendants herein.

In its second report, November 15, 1963, the Commission modified the Orders requiring divestiture to permit the respondents in the investigation case to employ any lawful means of preventing further violation without the necessity of complete divestiture. The reconsideration by the Commission of its divestiture order came as the result of the decision of the United States Supreme Court in *Gilbertville Trucking Company v. United States*, 371 U.S. 115 (1962),

which indicated that divestiture could often be too harsh a measure to obtain compliance with Interstate Commerce rules and regulations.

Finally, on June 29, 1964, the Commission reversed its prior order of denial and granted CENTRAL authority to control INLAND subject to a condition not in issue, based upon a finding that the individual applicants had not been responsible for the split-off, and that CENTRAL'S acquisition of control of INLAND would be consistent with the public interest, applying for the first time an exception to the Commission's policy against split-offs, which had been announced by the Commission in Shein's Express—Purchase—Leo Smith Forwarding Company, Inc., 80 M.C.C. 511 (1959). The last order of the Commission, dated October 20, 1964, found that the June 29, 1964, order was within the Commission's discretion and denied Plaintiffs' Petitions for Reconsideration.

SCOPE OF REVIEW

All parties are agreed as to limited scope of review here. Our duty is to determine whether the conclusions of the Commission "finds support in the record as a whole, ...' even though the Court would justifiably have made a different choice had the matter been before it de novo';" *NLRB v. Fant Milling Co.*, 360 U.S. 301, at 309 (1959); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1940); §10(e), Administrative Procedure Act, 5 U.S.C. §1009(e). If the Commission has made adequate findings which are supported by substantial evidence, this Court may

not set aside the orders even though it may disagree with such findings, *ICC v. Union Pacific R. Co.*, 222 U.S. 541, at 547 (1922); *Rochester Tel Corp. v. United States*, 307 U.S., 125, at 139, 140 (1939); *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951). "The wisdom and experience of (the) Commission, not of the Courts, must determine whether the proposed consolidation is 'consistent with the public interest' . . . if the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order." *McLean Trucking Co. Inc. v. United States*, 321 U.S. 67, at 87 (1944).

We find that the Commission had the authority to reopen for reconsideration and to rescind or modify prior orders and did not abuse its discretion in so doing here; that the Commission's finding approving the transaction as consistent with the public interest is supported by the record, and was not arbitrary, unreasonable nor an abuse of discretion; and that the Commission's finding of no dormancy of INLAND'S operating rights is supported by substantial evidence.

CONTINUING JURISDICTION OF ICC

The plaintiffs' attack on the Orders of June 24, 1964, and October 20, 1964, as being in excess of Commission authority is without merit. The Interstate Commerce Act itself gives the Commission a continuing jurisdiction over its orders, thereby allowing it to modify and even rescind a great number of

them at any time, Sections 17(6),.17(7) and 221(b) of the Interstate Commerce Act. There appears to be no such cut-off date, after which the Commission could not rescind or modify its orders, as is found in the National Labor Relations Act, 29 U.S.C. §16c(e), which prevents such action by the agency after the filing of the administrative transcript with the reviewing court, *In the Matter of the National Labor Relations Board*, 304 U.S. 486 (1938); *Ford Motor Co. v. NLRB*, 305 U.S. 364 (1939). Similar action on the part of the Commission has been sustained by the Courts in *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d, 128 (7th Cir. 1941, cert. denied, 314 U.S. 669); *Erie R.R. Co. v. United States*, 59 F. Supp. 748, 64 F. Supp. 162 (S.D. Ohio 1945).

In addition to the continuing jurisdiction granted to the Commission by Congress and approved by the Courts, we have in the instant case the fact that the Commission actually exercised such authority here by specifically delaying the effective date of its Orders, within which period the various parties before the Commission filed the various applications for reconsideration which have ultimately brought the litigation before us. Finally, we find that the Commission did not abuse its discretion in reconsidering the merits of the controversy in light of its exception to the policy against split-offs, because an application by the Defendants here as Plaintiffs prior to their having called such exception (as embodied in Shein's case) to the attention of the Commission might well have resulted in our dismissal of their petition for not hav-

ing exhausted the administrative remedies before the Commission, or a remand to it for the purpose of considering the exception, *Cf. Walker v. United States* 204 F. Supp. 918, 208 F. Supp. 388 (W.D. Tex. 1961). The fact that the Commission reconsidered the matter in light of the Shein exception without a three-judge court having said it should do so does not make its action in so doing arbitrary. Finding no abuse of discretion in applying a recognized exception which had not earlier been called to its attention, we have no reason to reverse or remand to the Commission; *United States v. Pierce Auto Freight Lines*, 327 U.S. 515, at 534, 535 (1946); *ICC v. Jersey City*, 322 U.S. 503, at 514 thru 518 (1944); *Carolina Scenic Coach Lines v. United States*, 59 F. Supp. 336, at 337, affirmed 326 U.S. 680 (1945); *Yourga v. United States*, 191 F. Supp. 373, at 376-378 (1961). On the contrary self-correction of its own errors through the use of judicial inventiveness and imaginative resourcefulness should be the aim of a well run administrative agency. *F.T.C. v. J. Weingarten, Inc.*, 336 F. 2d 687, 695-97 (5th Cir. 1964).

APPROVAL OF CONTROL

In view of the history of the litigation and the record before the Commission and this Court, we cannot say that the final action of the Commission in approving the control of INLAND by CENTRAL was unreasonable. The mere fact that the Commission had found on January 11, 1963, that the proposed control would not be consistent with the public interest did not prevent the Commission from later finding that it

would be, in view of the subsequent considerations brought to bear before the Commission. If supported by substantial evidence, the Commission's final order cannot be attacked solely because it may be, or seems to be, inconsistent with findings in other proceedings before it, *Virginian Ry. v. United States*, 272 U.S. 658, at 665, 666 (1926). The Commission's report of January 11, 1963, makes it clear that the main basis for denial of the control application was its general policy against approving split-offs. The initial report also stated that although the violation of the law (control) had been established in the investigation phase of the case, such violation was not so severe as to bar approval of the control application if it could otherwise be found to be consistent with the public interest. The Commission's policy against split-offs was held, however, to prevent approval. The report of November 15, 1963, was necessitated because of the Gilbertville case in which the Supreme Court indicated that divestiture, as previously ordered in the instant case, was often unnecessarily punitive instead of merely corrective, which was set out as the proper function of the Commission's exercise of power. The issue of whether or not to apply the general policy of the Commission against split-offs, or, on the other hand, to apply the one recognized exception to such policy, i.e., that applications resulting in approval of split-offs would not be automatically denied where the parties before the Commission were not directly responsible for such split-off, is one which we feel the Commission is as well if not better equipped to decide than is this Court. Having taken into consideration

the admonition of the Supreme Court in the Gilbertville case—to correct and not to punish—and having found that the parties before it had not been responsible for the split-off, and further that approval of the control by CENTRAL was a possible step toward permanent reunification of a significant part of the severed rights of INLAND which would be an improvement for the status quo, we cannot say that the orders of June 29, 1964, did not have a rational basis. We can also see why the Commission decided that the Yellow Transit Case, 65 M.C.C. 775, was not deemed to prevent approval, in view of the exception to the split-off doctrine expressed by the Commission in Shein's case, since there INLAND'S position was tainted by the split-off while the parties responsible for same still owned INLAND.

DORMANCY

The Commission's finding, starting with its report of January 11, 1963, and continuing on through its report of June 29, 1964, that the self-conducted operations of INLAND were not dormant appears to be supported by substantial evidence. The mere presence of the power of control over it by CENTRAL does not negate as a matter of law such finding.

All of the parties have litigated fully all of the issues of both law and fact and appear to have brought before the Commission all relevant factors and the results appear to be just and well founded upon the record brought before us. Since we find the Interstate Commerce Commission orders to be valid, we see no

reason to continue the injunction, 28 U.S.C. §2324, and, therefore, affirm the Orders of the Commission and hereby dissolve the temporary injunction.

Dated this 20th day of March, 1965.

/s/ John R. Brown
United States Circuit Judge

/s/ Adrian A. Speers
Chief Judge, U.S. District Court

/s/ D. W. Suttle
United States District Judge

A true copy of the original, I certify.

MAXEY HART, Clerk
By /s/ Frances Mosley
Deputy

[SEAL]

(A-12)

INTERSTATE COMMERCE COMMISSION

SERVICE DATE
January 17, 1963

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Decided January 11, 1963.

1. In No. MC-F-7882, application of Central Freight Lines, Inc., for authority to acquire control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and, in turn, by W. W. Callan, through such acquisition of control, denied.
2. In No MC-F-7682, upon investigation, the control or management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., found to have been effectuated in violation of section 5(4) of the Interstate Commerce Act, but that such violation terminated September 5, 1961.

W. E. Cureton and *George Nokes* for respondents and applicants.

William W. Guild and *Lloyd R. Reader* for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

[1]This report also embraces No. MC-F-7682, Central Freight Lines, Inc. —Investigation of Control—Inland Motor Freight Lines, Inc.

Edward O. Gaylord, Dan Felts, Thomas E. James, Rollo E. Kidwell, Ewell H. Muse, Jr., J. Malcolm Robinson, and *Reagan Sayers,* for protestants and interveners in support of the Bureau of Inquiry and Compliance.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, HUTCHINSON, AND GOFF HUTCHISON, COMMISSIONER:

The proceedings herein involved were heard on separate records and were made the subject of separate reports and recommended orders of the examiners. Exceptions were filed by respondents to the report and recommended order in No. MC-F-7682, herein called the *Investigation case,* and the Bureau of Inquiry and Compliance of the Commission, herein called the Bureau, and certain interveners replied. A request by respondents for oral argument was denied December 13, 1961. Exceptions also were filed by certain protestants to the report and recommended order in No. MC-F-7882, herein called the *Control case,* and applicants replied. By agreement of all parties of record, the transcript of testimony in the *Investigation case* has been incorporated by reference and made a part of the record in the *Control case.* The facts are common to both proceedings and the issues are interrelated and will be disposed of in a single report. Our conclusions differ from those of the examiner in the *Control case,* and, to some extent, from those of the examiner in the *Investigation case.*

In the *Investigation case,* the Commission, division

4, by order entered October 6, 1960, on its own motion, instituted an investigation under section 5(7) of the Interstate Commerce Act to determine whether the control or management of Inland Motor Freight Lines, Inc., of Corpus Christi, Tex.,[2] herein called Inland, in a common interest with Central Freight Lines, Inc., of Waco, Tex., herein called Central, "may have been effectuated and may be continuing in violation of Section 5(4) of the said Act." Inland, Central, W. W. Callan, principal stockholder and chairman of Central's board of directors, R. H. Linam, president of Central, and Blake Gillen, principal stockholder of Inland, were made respondents. A hearing was held at which the Bureau and respondents entered into a stipulation as to certain facts. Brown Express, a corporation, (Brown) and Red Arrow Freight Lines, Inc., (Red Arrow) both of San Antonio, intervened in support of the Bureau's position. Evidence was introduced by the Bureau and by Brown ann Red Arrow. Briefs were filed. The examiner's findings with respect to the ownership, organization, financial condition, and operations of Central and Inland, and the relationships of the respondents, are adopted as our own and will not be repeated herein except to the extent necessary for clarity.

In the *Control case*, by application filed May 29, 1961, after hearing in the *Investigation case*, Central seeks authority under section 5 of the act to acquire control of Inland through purchase of its outstanding capital stock for $94,200. By the same application, W. W. Callan seeks authority under the same section

[2]Unless otherwise indicated, all points mentioned herein are in Texas.

to acquire control of Inland through the transaction. A hearing was held at which Brown, Red Arrow, Southwestern Motor Transport, Inc. (Southwestern), and Alamo Express, Inc. (Alamo), opposed the application and introduced evidence. Robertson Tank Lines, Inc., appeared but withdrew its opposition.

On July 6, 1961, a motion of respondents to defer action in the *Investigation case* pending final disposition of the *Control case* was overruled. An application under section 210a(b) in the *Control case* for the temporary control by Central of Inland through management, was approved, upon reconsideration, by order issued September 5, 1961. On September 7, 1961, the report and recommended order of the examiner in the *Investigation case* was served finding generally that the control and management of Inland in a common interest with Central had been effectuated and was continuing in violation of the act. On September 9, 1961, Central exercised the temporary control authority granted in the *Control case*. Thereafter, on February 16, 1962, the temporary control authority was extended pending final determination of the application under section 5.

Central operates in interstate or foreign commerce, in part under certificates issued by this Commission in No. MC-30867 and numerous sub-numebered proceedings, and in part under the "grandfather" clause of section 206(a)(7),[3] of the act, herein for conven-

[3]Formerly conducted under the second proviso of section 206(a) of the act. When the proviso was repealed, effective October 15, 1962, authority for carriers engaged in operations thereunder to continue such operations was incorporated in paragraphs (7) (A) and (B) of amended section 206(a) 76 Stat. 911.

ience called the proviso. Its operations, as a motor common carrier, principally of general commodities, with exceptions, over regular routes in Texas, extend between Wichita Falls and Dennison on the north, Orange and Port Arthur on the east, Galveston, Houston and San Antonio, on the south, and Brownwood on the west, mainly via Fort Worth, Waco, Austin, and Beaumont, serving various intermediate and off-route points.

In *Central Freight Lines, Inc.—Control—Alamo Exp., Inc.*, 70 M.C.C. 610, decided August 5, 1957, herein called the *Alamo case*, an application of Central to acquire control of Alamo was denied. Thereafter, by report and order on further hearing, decided January 22, 1959, 75 M.C.C. 731, as modified by order of June 4, 1959, and as affirmed and clarified by supplemental report and order on further hearing, decided February 19, 1962, 90 M.C.C. 96, the Commission conditionally approved the acquisition by Central of control of Alamo as well as an amended plan whereby W. W. Callan would be substituted in lieu of Central as the purchaser of a non-carrier affiliate of Alamo. Sometime prior to the report and order of January 22, 1959, J. L. Walker, Alamo's principal stockholder, in *J. L. Walker v. Central Freight Lines, Inc., et al.*, Docket No. MC-116344, filed suit in a Texas Court [131st Judicial District, Bexar County, Tex.], to have the contract with Central declared a nullity. Central filed a cross-complaint for specific performance. J. L. Walker also filed complaint in the United States District Court for the Western District of Texas, San Antonio Division,

J. L. Walker v. United States, et al., Civil Action No. 2864, to set aside the order of the Commission of January 22, 1959, as modified and supplemented. The proceeding in the State court has been stayed pending disposition of the proceeding in the U. S. District Court. Thereafter, the District Court, with one judge dissenting, dismissed the complaint of J. L. Walker and sustained the reports and orders of the Commission. The Commission has postponed, until further order, the time within which the authority granted by the order of January 22, 1959, as modified and supplemented, may be exercised.

Inland operates[4], in interstate or foreign commerce, as a motor common carrier of general commodities, with exceptions, over regular routes, extending from Austin and Houston on the north, to Brownsville and Mission on the south, principally via San Antonio, Victoria, Corpus Christi, Falfurrias, Riviera, and Harlingen, serving a number of intermediate and off-route points. Inland's rights connect with those of Central at Austin, San Antonio, and Houston, and duplicate those of Central between Austin and San Antonio.

Gillen acquired the capital stock of Inland from James S. McNamara, now vice-president of Alamo, about December 1, 1957. McNamara acquired the stock in early 1956 from J. H. Robinson who, prior thereto, caused Inland to lease its Texas intrastate rights to Southwestern and Alamo on long-term

[4]Pursuant to a certificate issued in No. MC-4943, on October 30, 1956, which certificate reflected a change in corporate name from J. H. Robinson Truck Lines, Incorporated (Robinson), to Inland Motor Freight Lines, Inc.

leases. Subsequently, pursuant to order of the Railroad Commission of Texas, J. H. Robinson was authorized to acquire from a receiver for Inland the reversionary interest in the rights leased to Alamo and Southwestern. Southwestern and Alamo are utilizing the said leased intrastate rights for the performance of interstate operations under the proviso. The said leased intrastate rights parallel most of Inland's certificated interstate rights.

When McNamara acquired Inland's stock its rights were dormant. Although he revived the operations they were unprofitable and Inland became heavily indebted to Yellow Transit Freight Lines, Inc., herein called Yellow Transit. As a result, in early 1957, McNamara contacted R. H. Linam to see if Central was interested in buying Inland. Several meetings were held with Linam, Callan, and George Nokes, the attorney for Gillen since 1948, as well as the attorney for Central and Callan, and the husband of Callan's niece, but no agreement was reached primarily because of the purchase price and the belief that this Commission would not approve the transaction until Central first acquired Alamo, thereby permitting a reunification of the interstate and intrastate rights previously held by Inland. Later, in the same year, McNamara's doctors advised him to cease his motor carrier activities, and he subsequently entered into an agreement[5] to dispose of Inland to Yellow Transit.

[5]Pursuant to such agreement an application was filed with this Commission in No. MC-F-6741, *Yellow Transit Freight Lines, Inc.—Control and Merger—Inland Motor Freight Lines, Inc.*, on October 22, 1957. However, it was dismissed at the request of the parties on February 21, 1958.

At the same time, McNamara was negotiating with Nokes for the sale of Inland to an unknown principal. Also, on or about November 6, 1957, Callan called a regional official of the Commission and inquired if he could negotiate for the purpose of taking over the contract of Yellow Transit. He was advised that he could engage in such negotiations, if he desired. Shortly thereafter the said official was advised by Callan that discussions had been held with Yellow Transit.

In his negotiations with Nokes, McNamara was advised that he would be required to guarantee Inland's balance sheet, which he was unwilling to do. An audit was made of Inland's books and a meeting held in Nokes' office on November 24, 1957, at which McNamara learned that Gillen was the proposed purchaser of Inland's stock. A purchase price was determined and the parties signed an agreement the following morning. The next day Callan, Linam, Nokes, Gillen, and Central's traffic manager, appeared at the Commission's regional headquarters at Fort Worth to discuss the matter further. At that time Callan represented that Central no longer was interested in purchasing the stock of Inland because McNamara would not guarantee its balance sheet, but that Gillen was considering such a purchase; that Central was helping Gillen purchase the stock in order to keep it out of the hands of any long-haul competitor, and with the understanding Central might buy Inland at some future date; and that Central would advise Gillen in transportation matters, provide Inland with certain personnel on a loan basis, and work with it as an interline carrier. He stated that no contract then

existed for Central to acquire Inland from Gillen. McNamara later became concerned over the allowable deficit under his contract with Gillen and discussed the matter with Nokes. Those two then met with Callan and the president of Yellow Transit at Central's terminal in Dallas and an amendment was agreed to, including an arrangement for McNamara's name to remain on Inland's note, evidencing a bank debt for $75,000, for a period of six months. On November 30, 1957, McNamara, Nokes, Gillen and W. H. Johnson, Central's office manager, worked out the closing papers and Gillen took possession the next day.

The agreement, as amended, provided for a purchase price of $83,000, payable $2,000 in cash on transfer to Gillen of legal title to the stock, with the balance ($81,000) evidenced by Gillen's promissory note dated December 1, 1957, payable within 6 months, bearing interest at 5 percent. Physical possession of the stock was to remain with McNamara as security for Gillen's note, although details of certain financial aspects of the transaction are somewhat obscure.

It appears that Gillen had a net worth in excess of $100,000 at the time of purchase; that from the sale of an automobile agency and certain other properties he advanced $50,000 to Inland to liquidate outstanding debts, including approximately $50,000 owed to Yellow Transit; that he also advanced $19,000, secured from the sale of certain realty at Hubbard to Central for $30,517, subject to a lien of $11,517, which Central leases to others; that Central loaned $36,400 to Linam who made a series of non-interest bearing loans totalling that amount to Gillen for use

by Inland; that Central's loans to Linam were not evidenced by a note or other evidence of indebtedness; that Inland borrowed $81,000 from a bank at Waco, using its operating certificates as security, on Callan's assurance to the bank that Central would be willing to purchase them from the bank if Inland defaulted; that Central sold 2 tractors to Inland for $15,600 under a conditional sales contract which it assigned, with recourse, to a bank at Ft. Worth; and that Central also assigned its contract to purchase 5 trailers to Inland, and the latter obtained a purchase money loan of $27,235, secured by a chattel mortgage, and which trailers Central agreed to purchase in the event of default by Gillen.

The record further shows that Inland had no telephone listings except at Corpus Christi; that Inland leased trailers and obtained pickup and delivery service from Central at reduced rates; that one Central employee was loaned to Inland for 6 weeks to set up procedures and to manage Inland's office and another for 9 months to act as Inland's general manager and continued, for an additional period of 5 months, to devote 30 to 40 hours per week in handling Inland's loss and damage claims; that Central's employees regularly prepared Inland's monthly income and balance sheet statements; that Inland had offices located on Central's premises at Austin, San Antonio, and Houston, and all of its rating and billing work was done by employees of Central; that Inland was billed and charged monthly for the foregoing services and others, including vehicle repairs, fuel and oil supplies, and dock charges, with no real effort by Central

to collect the charges; that Inland's indebtedness to Central exceeds $84,500, evidenced in part by a promissory note of $77,096, on which no payments have been made; and that Gillen was assured by Callan of Central's proposal to seek to purchase Inland at a future date.

When Gillen took over the operations of Inland, it had terminals at Harlingen, Corpus Christi, and Houston, had 21 employees, and owned 4 operational tractors and 4 trailers. At the time of the hearing in the *Investigation case* Inland had 7 drivers and 3 office employees, all stationed at Corpus Christi.

It appears that at the time Gillen purchased the stock of Inland, Callan expected that Central would seek to purchase its operating rights within one year, and had no intention of involving Central in Inland's affairs beyond helping it to obtain loans, and providing it with advice and experience through loan of Central's employees. Unforeseen complications in the *Alamo case* necessitated the additional assistance previously described. The record shows that on June 7, 1958, about the time Inland obtained the $81,000 loan, Central's directors authorized it to purchase the certificates of Inland for $100,000. Thereafter, 3 different applications to effect the transfer were prepared but never filed with this Commission because the *Alamo case* had not been determined. Following institution of the *Investigation case* on October 6, 1960, Central and Gillen, on May 2, 1961, executed the agreement in the *Control case* whereby Central would purchase the outstanding capital stock of Inland for $94,200, presumably less the $36,400 loaned by Cen-

tral to Linam and thence to Gillen. The parties propose only a control by Central of Inland at this time, indicating that if and when Central receives a favorable conclusion of the *Alamo case*, steps will be taken to merge Inland into Alamo.

Under its temporary control of the operations of Inland, Central has provided Inland with terminal facilities at Austin, San Antonio, and Houston, and has caused it to reinstate terminal operations at Victoria, McAllen, Harlingen, and Brownsville. While it has terminated the services of Gillen and the office employees at Corpus Christi, which work Central employees now perform, Inland now has 12 employees, of which 4 are part-time agents, 5 are regular drivers and the others are part-time drivers. While no evidence was submitted in the *Control case* respecting the actual scope of the operations performed by Inland under the temporary control authority, Callan testified that savings in personnel, terminal charges, travel and legal expenses had been effected in an amount of $1,981 a month and aggregating in excess of $23,000 a year; that additional savings would be realized through Central's greater buying power; and that Inland would be further benefited as a result of better credit, newer equipment, and competent supervision.

In their exceptions to the findings of the examiner in the *Investigation case*, that it was reasonable to believe that Central, Callan, and Linam accomplished the control of Central and Inland in a common interest in violation of section 5(4) of the act, and that the violation should be terminated, respondents argue

that Inland, a small carrier with no intrastate rights, could not hope to operate profitably; that McNamara was unable to operate the carrier profitably and was forced to sell because of illness; that McNamara instituted the negotiations which led to the sale of Inland's stock to Gillen; that Central made full disclosure of its interest in encouraging Gillen to purchase the stock of Inland; that Gillen was not bound to sell to Central and had attempted to dispose of the stock to other carriers; that when Gillen was encouraged to buy the stock of Inland they had no intention of providing assistance other than the loan of certain employees who, at all times, were under the control of Gillen; that the additional assistance to Inland was necessary to prevent its complete collapse; that the assistance rendered resulted in no economic advantage to Central; and that a finding that Inland was unlawfully controlled would result in effectively destroying it to the detriment of its creditors and service to the public. They further argue that the Commission has found no control or power to control in similar instances, citing *McLean Trucking Co.—Pur.—Atlanta, C. A., Motor Lines, Inc.*, 60 M.C.C. 475, *Magnolia Exp. Inc.—Purchase—Capital Transport, Inc.*, 54 M.C.C. 519, and *Atlanta Motor Lines, Inc.—Control and Merger*, 70 M.C.C. 448; that the Commission already has recognized the need to preserve Inland's operations by grant of temporary authority; and that the public interest requires a consideration of all matters with a view of preserving Inland's service.

In reply, the Bureau contends that the argument of

respondents that the examiner failed to "report" certain facts, and to consider the true basic facts that existed in the situation, are without merit; that most of the "facts" set forth by the respondents either were considered and discussed by the examiner or have no material bearing on the issues; that respondents do not attack the examiner's findings as being unsupported by the evidence, but argue that he should have reached a different conclusion; and that the acts of the parties and the assistance provided Inland by Central transcends mere encouragements and should be considered unlawful control.

Interveners, in their replies, argue primarily that Inland's rights, being complementary to those of Central, provide access to southwestern Texas and the unlawful control has resulted in a competitive advantage to Central and loss by them of traffic; that the respondents' sole argument is that they were compelled to render the aid and assistance afforded Inland because they had encouraged Gillen to purchase the stock of that carrier; that it is inconceivable that they would have channeled so much money and aid into its operations with no hope of profit; that the issue is not whether Central would benefit economically, but whether it and respondents effectuated control of Inland's operations without approval of the Commission; that the term control does not mean absolute control, but also includes the power to control, citing *Lancaster & New York M. Freight Service, Inc., Conversion*, 83 M.C.C. 511; that whether Inland would be destroyed by an adverse ruling is not material to the issues; and that the record is replete with evidence

showing that unlawful control was effectuated by the parties.

Protestants except to the findings of the examiner in the *Control case* that the application therein should be approved. They argue that the examiner has failed to support his finding that such approval would be consistent with the public interest; that evidence to justify such conclusion is not of record; and that a finding to that effect must be based on evidence presented of record and not on assumptions. Protestants further argue that Inland ceased to function as an interstate carrier in its authorized area when it leased its intrastate rights to Alamo and Southwestern, and they utilized such authority as a basis for the institution of interstate operations under the proviso; that the separation of Inland's intrastate rights from its interstate rights, and creation of two operations in interstate commerce, was found objectionable and a basis for denial of the application in the *Yellow Transit case*;[6] that the evidence is clear that the reversionary interests in the intrastate rights leased to Alamo and Southwestern by Inland is now held by J. H. Robinson, and rejoinder of the interstate and intrastate rights, if Central acquired both Inland and Alamo, could not be for a period longer than the existing lease; and that it would be contrary to established precedent of the Commission to sanction the creation of duplicating operations in interstate commerce through the device of a prior disposition of corre-

[6] *Southern Pacific Transport Co.–Purchase–Inland Motor*, 65 M.C.C. 775, decided June 4, 1956, embracing *Yellow Transit Freight Lines, Inc.–Purchase–Inland Motor*, the Yellow Transit case.

sponding intrastate authority, citing *Navajo Freight Lines, Inc.—Pur.—Strickland Transp. Co.*, 75 M.C.C. 713.

Protestants further argue that in the *Yellow Transit case*, it was found that Inland's interstate rights had been dormant since 1953; that McNamara testified that they were dormant when he acquired control of Inland in 1956; that there is no evidence showing the scope of Inland's operations when Gillen acquired its stock; that the evidence shows Central exercised unlawful control of Inland through Gillen, and any service performed by Inland after Gillen acquired its stock on December 1, 1957, is entitled to no weight; that even if the data of record respecting its operations after that date are considered it would disclose that only a few points were served, and none south of Bishop; that no public witnesses support the application; that Inland, prior to the unlawful control, was not a competitive factor; and that in the absence of any evidence of a public need for additional service, they are entitled to protection from competition by Central.

In respect to the question of Central's fitness, protestants argue that the factual situation is not an issue, but that the sole issue is whether Central's violation of the act properly may be overlooked; that there has been no contention of ignorance or lack of legal knowledge; that while past violations are not an absolute bar to an approval of a transaction under section 5, the Commission consistently has disapproved transactions where, as here, the applicants

have flagrantly flouted the Commission's jurisdiction; and that, contrary to the conclusions of the examiner, grants of temporary authority under section 210a(b) are based on different criteria, create no presumption as to the action that should be taken on the section-5 application, and certainly do not render moot the question of unlawful control or unfitness of Central.

In reply, Central argues that Gillen revitalized the operations of Inland pursuant to Commission instruction, thereby refuting any inference of dormancy; that there is no basis for concluding that it would provide any new or unauthorized service to the public; that the evidence does not support a finding that protestants would be materially affected by approval in the *Control case*, and they have advanced nothing new which was not considered by the Commission when it granted the temporary control authority to Central; that the temporary control saved Inland's operations, reassured its creditors and employees, and benefitted the public through continuance of its service; and that Central has demonstrated its ability to restore financial stability and improve Inland's service, and the findings of the examiner should be upheld.

The principal question presented for determination in the *Investigation case* is whether the control of management of Central in a common interest with Inland was effected without prior approval of this Commission at the time Gillen acquired the stock of Inland and continued until the grant of the temporary control authority to Central in the *Control case* on September 5, 1961. In respect to the grant of temporary control authority, it may not properly be con-

strued as indicating that the Commission either condoned or sanctioned any unlawful acts of the respondents. On the other hand, it is clear that the grant of temporary authority effectively terminated any unlawful control that may have existed. See *Ashworth Transfer, Inc.—Hawkes Transp Co.*, 87 M.C.C. 653.

Whether common control has existed in a particular situation is one of fact and must be determined by the special circumstances in each case. *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125. The management of one carrier in a common interest with another, even though unlawful, does not necessarily imply harm or detriment. See *Masten Transp., Inc. — Merger*, 70 M.C.C. 421.

In *Stacks-Investigation of Control*, 75 M.C.C. 625, the Commission, division 4, stated on page 636 thereof as follows:

> Paragraphs (4), (5), and (6) of section 5 of the act enumerate various illustrative transactions, creating a conclusive presumption of the accomplishment of the control or management in a common interest of two or more carriers, by reason of affiliation. Under paragraph (6), affiliation exists if it is "reasonable to believe" that the affairs of one carrier will be managed in the interest of another. It is not necessary that the carrier of which control would be acquired would be managed solely or exclusively in the interest of the carrier with which the person is affiliated. *Greyhound Corp.—Investigation of Control — Southern, Ltd.*, 45 M.C.C. 59, 77, and *Southwestern, Greyhound Lines, Inc.—Merger*, 39 M.C.C. 243. Once such affiliation has been

established, the conclusive presumption of paragraph (5) that control or management in a common interest has been accomplished or effectuated applies. As has been stated, section 5(4) contains broad provisions prohibiting the control or management of one carrier in a common interest with another, without our prior approval, however, such result is obtained. *United States v. Marshall Transport Co.*, 322 U.S. 31.

In the subject proceedings, both examiners, in their separate reports, have concluded that the evidence establishes that Central unlawfully acquired control of Inland on December 1, 1957, when Gillen took over its operations. In our opinion, such conclusion of the examiners is well supported by the evidence. It is clear that Gillen was without motor carrier experience when he acquired the stock of Inland, and that, except for solicitation and collection of accounts, he was dependent upon the employees of Central for the conduct of Inland's operations. The $36,400 loan from Central through Linam for the use of Inland, the accumulation of an indebtedness in excess of $84,000 resulting from services performed by Central for Inland, with no real effort by Central to collect such indebtedness or curtail its services, the arrangement of Inland's financing through *assurances* by Central to the banks, the understanding between Gillen and respondents that he would be able to recoup his investments, plus 6 percent, as soon as the *Alamo case* was approved, and the willingness of Central and its officers to invest in the continuation of Inland's service, support the conclusion that Central, Callan, and Linam were, at the time Gillen purchased the stock on December 1,

1957, affiliated with each other within the meaning of section 5(6) of the act; that the control or management of Inland, or the power to control or manage such carrier, in a common interest with Central did exist and continued until terminated by the grant of temporary control authority on September 5, 1961; and that Callan, Linam and Gillen participated in the effectuation and continuance of such unlawful control.

Considering that Central is an aggressive, well managed motor carrier and has engaged in motor carrier operations for a number of years; that its officers are experienced and well familiar with motor carrier proceedings and the rules and requirements of the act; and that Central and its officers have been represented by competent counsel, it is clear that a finding could not be justified that the action of the parties in effecting unlawful control and management of Inland in a common interest with Central was not willful. The arguments of respondents that the financial and other assistance afforded Inland should be regarded only as encouragement; that such involvement was necessary to protect Inland's operations; that they had no intention of involving Central in Inland's affairs to the extent shown; that they openly and admittedly encouraged Gillen to purchase the stock of Inland, and openly and fully disclosed to representatives of the Commission the interest of Central in Gillen's purchase of the stock of Inland; that failure to make a more serious effort to collect the indebtedness of Inland to Central was because of the futility thereof; that Central could not possibly gain any

economic advantage from the control of Inland; and that the unexpected delay in obtaining a final disposition of the *Alamo case* was the sole cause of the situation, are not sufficient to relieve respondents of their unlawful action. On the other hand, such factors, when considered in connection with Inland's insolvency, and its lack of adequate facilities, personnel and management to conduct efficient motor carrier operations, support the finding that the violations were not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland. We do not believe that the violations were so severe as to bar approval of the application in the *Control case* if it is otherwise found to be consistent with the public interest. See *Atlas Van Lines, Inc. — Control and Merger*, 75 M.C.C. 175, *Masten Transp., Inc.— Merger*, 70 M.C.C. 421, *Takin Bros. Frt. Line, Inc.— Control—Iowa-Nebr. Transp.*, 75 M.C.C. 236, and *Baggett—Control—Walker Hauling Co.*, 65 M.C.C. 522.

As previously indicated, the operations of Inland have not been profitable. Part of its difficulties have been due to the fact that its previously-held intrastate rights, corresponding to its interstate authority, are under long-term leases to Alamo and Southwestern. Central does have an application pending to acquire control of Alamo and has asserted that it proposes to merge Alamo and Inland if successful in acquiring both carriers. It also has indicated that one of the purposes of the transaction in the *Control case* is the reunification of the interstate rights of Inland with that portion of the corresponding intrastate rights

leased to Alamo. However, there is no present assurance that Central will ultimately succeed in acquiring Alamo. Moreover, the evidence is clear that the reversionary interest in the intrastate rights lease to Alamo is no longer in Inland but in J. H. Robinson. What disposition the latter may propose of the intrastate rights upon expiration of the existing leases and what effect revision of section 206(a) of the act may have upon the proviso operations cannot be determined in these proceedings. In any event, there is no showing that any permanent unification of the intrastate rights leased to Alamo and the interstate rights of Inland would be accomplished by approval of the application in the *Control case*. In the absence of such a showing, the transaction in the *Control case* does not meet the objection to a prior proposal to transfer Inland's interstate rights set forth in the *Yellow Transit case*, at page 779, as follows:

> The Commission has declined to approve various transactions where severance of interstate and corresponding intrastate operating rights, theretofore operated by a single carrier, might result or had resulted in the creation of 2 rights, in place of 1, to operate in interstate or foreign commerce over the same highways and between the same points; and it has declined to sanction the use of various devices in attempting to create 2 rights in place of 1. See *Courier Exp., Inc.—Purchase—Huber Motor Transp. Co.*, 45 M.C.C. 688, and cases cited therein, in some of which the severance and creation of the second right was being proposed and in others it had been accomplished. Applicant's argument that Alamo and S.M.T. leased the intrastate rights and instituted

proviso operations, knowing full well that Inland intended to transfer the interstate certificated rights, does not alter the situation and does not lessen the impact an approval and consummation of the purchase by Yellow Transit would have upon competition in the area. Inland itself owed a duty in seeing that the intrastate rights were not used as a basis for proviso operations, if it intended to dispose of the interstate certificated rights to another carrier. Following prior cases, we are of the opinion and find that only 1 interstate operating right may properly emerge from the single operation conducted by Inland, and that the procedure used by the parties in attempting to create 2 interstate operations may not be sanctioned in the public interest.

As to the service performed by Inland under its rights, applicants have submitted abstracts of shipments handled by Inland in 1958, 1959, 1960, and the period January 5, through October 21, 1961, and for the month of April 1961. No evidence was presented showing the actual scope of the service rendered by Inland at the time Gillen acquired its stock in December 1957, and, as a rule, we have accorded little weight to shipments handled by a carrier where the evidence shows it has been unlawfully controlled in a common interest with another carrier. However, we believe the scope of Inland's service at or about the time Gillen acquired the stock of such carrier can be determined by an analysis of the shipments transported in January 1958. During this month, Inland transported 488 shipments of various commodities, of which 8 originated at 5 points served by Inland and 480 were interline shipments received by Inland at

an unnamed interline point and transported to 23 destinations served by it, including Harlingen served on 147 shipments, Brownsville on 98 shipments, and McAllen on 72 shipments, with more than 20 shipments moving to Westlaco, Pharr, Mission, and Edinburg, 17 to San Benito, 10 to Donna, and less than 10 shipments each to 14 points. Some 6 shipments were interlined by Inland for movement beyond.

As to the service performed by Inland prior to the grant of temporary authority on September 5, 1961, the abstract of shipments handled in 1960 shows that some 700 shipments were transported, of which 499 (71 percent) of various commodities originated at San Antonio, 105 shipments of carbon black originated at Aransas Pass—Kosmos, and 62 shipments of chemicals originated at Bishop—Chemcel. Some 30 shipments were received by Inland at unnamed interline points. About 560 shipments (80 percent) were interlined by Inland with other motor carriers at unnamed points for movement beyond its lines, 110 shipments moved to Houston, and 29 shipments moved to various destinations in Texas. In the period January 5 through October 21, 1961, Inland transported 975 shipments, of which 277 moved after September 5, 1961. Of the total shipments 768 (80 percent) of various commodities originated at San Antonio, 62 shipments of carbon black originated at Aransas Pass —Kosmos, 27 shipments of chemicals originated at Bishop—Chemcel, and 116 shipments of various commodities involved interline traffic received by Inland at unnamed points. Of 10 destination points served prior to September 5, 1961, Houston was served on 57

shipments, Harlingen on 2 shipments, Alice on 3 shipments and 5 points were served on one shipment each. The remainder of the shipments were interlined by Inland at unnamed points for movement beyond its lines. The exhibit listing shipments transported in April 1961, shows that some 790 shipments were transported, of which 674 shipments (86 percent) involved interline traffic received by Inland at unnamed points, 84 shipments originated at San Antonio, and 32 shipments originated at Corpus Christi, Kosmos, Chemcel, and Houston. Corpus Christi was served on 618 shipments (80 percent), Victoria on 62 shipments terlined by Inland primarily at Houston for movement Houston on 15 shipments and 95 shipments were inbeyond its lines.

From the above, it is evident that the service performed by Inland in January 1958, and in 1960 and the indicated periods in 1961, has been limited to some extent as to origins and destinations served. However, we believe a finding is warranted that the carrier generally has operated commensurate with its resources and facilities, that the factual situation has changed since the decision in the *Yellow Transit case*, and that its operating rights, generally, cannot now be found to be dormant. We also do not believe a finding is warranted that the operations of Inland were influenced to any great extent by Central or persons affiliated therewith, considering the service performed in 1958 and 1961, even though it is clear that the power to control the operations of Inland did vest in Central and persons affiliated with such carrier.

Whether some modification of the operating author-

ity of Inland would be in order on the basis that certain portions are dormant need not be determined. It is clear that approval of the application in the *Control case* would not meet the objection set forth in the *Yellow Transit case* to a transfer of Inland's interstate rights. On the present record, therefore, the application cannot be found to be consistent with the public interest. As Central is now in temporary control of Inland through management, our conclusion to deny the application in the *Control case* will necessitate termination of such temporary control authority. In addition, as termination of the temporary control authority would reinstate he unlawful common control found to have existed prior to September 5, 1961, respondents who are found to have participated in the continuance of the unlawful control, will be expected to take such steps as may be necessary to dispose of all their interest, direct or indirect, in Inland or in any of its stock, effective with termination of the temporary control authority, and to advise this Commission of the steps they have taken.

In No. MC-F-7682, we find that the control and management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., was effected in violation of section 5(4) of the act, and that the said violation continued until September 5, 1961, when it was terminated by the grant of the temporary control authority in No. MC-F-7882; that respondents, W. W. Callan, R. H. Linam, Blake Gillen, and the carriers named immediately above, participated in the effectuation of the said control and management, and in its continuance.

In No. MC-F-7882, we find that the transaction has not been shown to be consistent with the public interest, and that the application, accordingly, should be denied.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D. C., on the 11th day of January, A. D. 1963.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Investigation of the matters and things involved in these proceedings having been made, said division, on the date hereof, having made and filed a report herein containing its findings of fact and conclusions thereon, which report and the separate reports of the examiners in said proceedings, are hereby made a part hereof:

It is ordered, In No. MC-F-7682, That, effective with termination of temporary authority granted in No. MC-F-7882, respondents Central Freight Lines, Inc., of Waco, Tex., W. W. Callan, and R. H. Linam,

also of Waco, and Blake Gillen, of Corpus Christi, Tex., be, and they are hereby, required to divest themselves of any and all interest, direct, or indirect, which they now have in the capital stock of Inland Motor Freight Lines, Inc., also of Corpus Christi; *provided, however*, that in such divestiture, none of said shares of capital stock shall be sold or transferred, directly or indirectly, to any agent of, or any one otherwise directly or indirectly affiliated or connected with, or under the control of W. W. Callan, or of any corporation which he is financially interested or affiliated with, or to any stockholder, officer, director, employee, or agent of any such corporation or affiliated company or companies.

It is further ordered, That, prior to termination of the said temporary authority, the said respondents shall report to the Commission, in writing, under oath, the action taken by each of them to comply with the terms of this order and the terms under which such compliance is to be affected.

It is further ordered, That the application in No. MC-F-7882 be, and it is hereby, denied.

It is further ordered, That this order shall be effective 60 days from the date it is served.

And it is further ordered, That temporary authority granted in No. MC-F-7882 on September 5, 1961, as extended by order of February 16, 1962, be, and it is hereby, terminated on said effective date.

By the Commission, division 3.

HAROLD D. McCOY,
Secretary.

SERVICE DATE
JULY 30, 1963

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 23d day of July, A. D. 1963.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC

Upon consideration of the record in the above-entitled proceedings, the petition of Central Freight Lines, Inc., W. C. Callan, R. H. Linam, Inland Motor Freight Lines, Inc., and Blake Gillen, filed March 18, 1963, for reconsideration of the report and order of the Commission, Division 3, decided January 11, 1963, and the replies thereto filed by protestants and interveners; and

It appearing, That the conclusions in the said report with respect to No. MC-F-7882 are based on adequate findings supported by the record, and that there has been presented no error of fact or law with respect to the findings and conclusions therein which warrant reconsideration:

It is ordered, That No. MC-F-7682 be, and it is hereby, reopened for reconsideration on the present record.

It is further ordered, That the said petition be, and it is hereby, denied, in all other respects.

And it is further ordered, That the effective date of the order of January 11, 1963, in No. MC-F-7882, be, and it is hereby, postponed pending further order therein.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

MF-2809

INTERSTATE COMMERCE COMMISSION

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.–CONTROL–INLAND MOTOR FREIGHT LINES, INC.

Decided November 15, 1963

On reconsideration, findings in the prior report, 90 M.C.C. 777, modified.

Additional appearances:

John S. Fessenden and *Roland Rice* for applicants and respondents.

Ellis V. Gregory for Bureau of Inquiry and Compliance, Interstate Commerce Commission.

Van Thompson, Jr., for protestant.

REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 3, ACTING AS AN APPELLATE DIVISION, COMMISSIONERS TUGGLE, MURPHY, AND TUCKER

MURPHY, *Commissioner:*

In the prior report, 90 M.C.C. 777, decided January 11, 1963, the Commission, division 3, found, in No. MC-F-7682, that the control and management of Inland Motor Freight Lines, Inc., of Corpus Christi, Tex., in a common interest with Central Freight Lines, Inc., of Waco, Tex., hereinafter called Inland and Central, respectively, had been effectuated in violation of section 5(4) of the Interstate Commerce Act, that the said violation had continued until September 5, 1961, when it was terminated by the grant of temporary control authority in No. MC-F-7882, and that the named respondents, Inland, Central, W. W. Callan, principal stockholder and chairman of Central's board of directors (Callan), R. H. Linam, president of Central (Linam), and Blake Gillen, principal stockholder of Inland (Gillen), had participated in the effectuation of such unlawful control and management, and in its continuance. In No. MC-F-7882, it was found that the section 5 transaction, whereby Central proposed to acquire control

[1] This report also embraces No. MC-F-7682, Central Freight Lines, Inc.–Investigation of Control–Inland Motor Freight Lines, Inc.

of Inland through purchase of its outstanding capital stock from Gillen, would not be consistent with the public interest. An order was entered denying the application in No. MC-F-7882, and directing that the named corporate and individual respondents in No. MC-F-7682, except Inland, divest themselves of any and all interest, direct, or indirect, that they have in the capital stock of Inland.

A petition was filed March 18, 1963, whereby respondents sought reconsideration of the above order, approval of the control of Inland by Central in No. MC-F-7882, hereinafter called the control application, and stay of the order, including that portion of the order terminating temporary authority granted on September 5, 1961, as extended by order of February 16, 1962. Replies were filed by the Bureau of Inquiry and Compliance (the Bureau) and by protestants and interveners, Brown Express, Inc., Red Arrow Freight Lines, Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc.

By order of July 23, 1963, we reopened the proceeding in No. MC-F-7682, hereinafter called the investigation proceeding, for reconsideration on the present record, postponed the effective date of the order of January 11, 1963, pending further order of the Commission, and denied the petition in all other respects.

Our reopening of the investigation proceeding for reconsideration was solely for the purpose of taking into consideration the decision of the United States Supreme Court in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, decided December 3, 1962, hereinafter called the *Gilbertville* case, and our further discussion herein will, therefore, be concerned solely with the question whether, in light of the Court's decision in the *Gilbertville* case, and in order to assure that the section 5(4) violation is terminated, it is appropriate to require Gillen to dispose of his stock interest in Inland, or whether some other less drastic requirement may be imposed. The facts are adequately set forth in the prior report and will not be repeated herein except to the extent necessary for clarity of discussion.

Respondents in their petition rely on the Court's decision in the *Gilbertville* case as support for the contention that the divestiture by Gillen of Inland's stock, in the instant proceeding, is an inappropriate remedy. In this connection, they argue that such divestiture by Gillen would work on him a drastic hardship, and could result in bankruptcy, with irreparable loss to himself and to numerous creditors, including Central. They further argue

that, for the same reasons, to require Central to divest is to visit punishment upon that carrier without corresponding benefit to the public, and they point out that in the *Gilbertville* case, the Court noted that "the Commission's power is corrective, not punitive." They contend that the *Gilbertville* case seems clearly to say that divestiture by Gillen should not be required.

In reply, the Bureau contends that respondents have been afforded full hearing in the investigation proceeding on the issue of a violation of section 5(4); that after exhaustive arguments of the facts and law by respondents and the Bureau, the Commission discussed its findings of fact and conclusions of law with specificity; that the order requiring divestiture represents the considered opinion of the Commission based on those findings; that the Commission has functioned within the concept expressed by the Supreme Court in the *Gilbertville* case; and that, based on its findings that the violation stems from Gillen's affiliation with the other respondents, the Commission has properly ordered Gillen to divest himself of his interest in Inland.

The Bureau further argues that the fact that respondents may be hurt by the order requiring termination of the violation is no defense, otherwise carriers could evade the law by presenting the Commission with a *fait accompli*, and that, furthermore, the argument that Gillen would be forced into bankruptcy is unsupported by the evidence and is speculative since the record shows that Gillen, before investing his funds, was guaranteed his full investment, plus 6 percent interest. The Bureau concludes that requiring respondents to divest themselves of all interests in Inland is not only appropriate but is necessary to assure the cessation of the violation.

The remaining interveners and protestants subscribe, generally, to views similar to those adopted by the Bureau, and most point out that other than discontinuing the investigation proceeding and approving the control application, the respondents have suggested no alternative to divestiture as a means of terminating the violation.

Recapitulating some of the facts in these proceedings, Gillen acquired the capital stock of Inland from James S. McNamara, now vice president of protestant Alamo, who had previously acquired the stock from J. H. Robinson, now deceased. Robinson, while in control of Inland, had caused that carrier to grant long-term leases of Inland's intrastate Texas operating authority to Alamo and Southwestern, and thereafter personally acquired,

pursuant to an order of the Railroad Commission of Texas, the reversionary interest in the operating rights, subject of the leases. Southwestern and Alamo are utilizing the said leased intrastate rights for performance of interstate operations, under the "grandfather" clause of section 206(a)(7) of the act, which correspond substantially to the operations authorized to be performed by Inland under its interstate certificate. For reasons fully set forth in the prior report and which need not be repeated here, the above-described separation of intrastate rights from interstate rights formed the basis for denial of the *control* application in the prior report. As indicated, the petition herein, to the extent it seeks reconsideration of the latter action, has been denied.

The finding in the prior report that Central unlawfully acquired control of Inland when Gillen acquired control of Inland was predicated on the fact that the purchase of Inland's stock by Gillen was consummated with the aid of Callan and Linam, and that subsequent to the date of purchase and prior to the grant of temporary authority in connection with the control application the operations of Central and Inland were conducted in a manner which left no doubt that the two carriers were unlawfully controlled and managed in a common interest. The finding that common control and management had been effectuated is not contested by respondents in their pleading here being considered.

While it was concluded in the prior report that certain factors advanced by respondents as negating the existence of a law violation did not, in fact, do so, and did not justify a finding that the action of the parties in effecting unlawful control and management of Inland in a common interest with Central was not willful, it was further found that those factors, when considered in connection with Inland's insolvency and its lack of adequate facilities, personnel, and management to conduct efficient motor carrier operations, supported a finding that the violations were not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland, and the belief was expressed that the violations were not so severe as to bar approval of the control application if it could otherwise be found to be consistent with the public interest. As has been shown, the latter finding could not be made because of other considerations.

With respect to the Commission's power to require termination of violations of the nature discussed above, the Supreme Court, in the *Gilbertville* case, apointed out that there is little

question that divestiture is within the scope thereof. However, the Court further stated:

> as § 5(7) itself implies, the Commission's power is corrective, not punitive. The justification for the remedy is the removal of the violation. * * * * * * * * Our duty is to give "complete and efficacious effect to the prohibitions of the statute" with as little injury as possible to the interests of private parties or the general public.

In remanding that case for further proceedings and having reference to our choosing the proper remedy, the Court referred to certain "mitigating considerations," as follows:

> we are faced with evidence that the statutory violation occured not just from Kenneth Nelson's act of acquiring Gilbertville, but from the acquisition plus subsequent practices integrating the management and operations of Nelson and Gilbertville, *practices that could conceivably be discontinued without divestiture*. [Emphasis added.]

As previously pointed out, denial of the control application in the prior report was based on considerations other than the law violation which, similarly to that in the *Gilbertville* case, stemmed not alone from Gillen's action in acquiring Inland's stock, but from that action and Inland's subsequent dependency upon Central for financial and operational assistance, a dependency that could conceivably be eliminated, leaving Inland free to be operated independently of Central and persons in control of or affiliated with Central. Respondents have not, to date, suggested any alternative to divestiture which would, in the fact of denial of the *control* application, terminate the law violation.

We conclude that the named respondents should be free to employ any lawful means to prevent any further violation upon termination of the temporary authority in No. MC-F-7882, rather than be limited exclusively to divestiture, and our order will require them to cease and desist from further violation and to report promptly the steps taken by them in compliance with said order.

We find that the findings in the prior report, upon further consideration, should be modified in accordance with the discussion herein.

An appropriate order will be entered.

(A-43)

SERVICE DATE
July 2, 1964

INTERSTATE COMMERCE COMMISSION

No. MC-F-7882[1]

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Decided June 29, 1964

Upon reconsideration:

(1) In No. MC-F-7882, acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and, in turn by W. W. Callan, through the transaction, approved and authorized, subject to condition.

(2) In No. MC-F-7682, upon investigation, control or management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., found to have been effectuated in violation of section 5(4) of the Interstate Commerce Act, but that such violation terminated September 5, 1961. Investigation discontinued. Prior reports 90 M.C.C. 777 and 93 M.C.C. 411.

Appearances as shown in the prior reports.

---

[1]This report also embraces No. MC-F-7682, Central Freight Lines, Inc. —Investigation of Control—Inland Motor Freight Lines, Inc.

SECOND REPORT OF THE COMMISSION ON RECONSIDERATION

DIVISION 3, ACTING AS AN APPELATE DIVISION, COMMISSIONERS TUGGLE, HUTCHINSON AND MURPHY

MURPHY, *Commissioner:*

In the prior report on reconsideration, herein called the *second prior report* 93 M.C.C. 411, decided November 15, 1963, the Commission, Division 3, acting as an Appellate Division, modified the findings in the report of the Commission, Division 3, herein called the *first prior report*, 90 M.C.C. 777,[2] decided January 11, 1963, to allow the respondents in No. MC-F-7682, herein called the *investigation* case, to employ any lawful means of preventing further violation upon termination of the temporary authority in No. MC-F-7882, herein called the *control* case, rather than to require divestiture of the unlawful control. On January 14, 1964, applicants-respondents filed a petition for waiver of rule 1.101(e) of the General Rules

[2]The report in 90 M.C.C. 777 found (1) that the control and management of Inland Motor Freight Lines, Inc., herein called Inland, in a common interest with Central Freight Lines, Inc., herein called Central, had been effectuated in violation of section 5(4) of the act, that said violation had continued until September 5, 1961, when it was terminated by the grant of temporary control authority, and that respondents Inland, Central, and W. W. Callan, R. H. Linam, and Blake Gillen, herein called Callan, Linam and Gillen had participated in the effectuation of such unlawful control and management and in its continuance, and (2) that the section 5 transaction would not be consistent with the public interest. An order was entered denying the application in the *control* case, and directing that the named corporate and individual respondents, in the *investigation* case, except Inland, divest themselves of any and all interest, direct or indirect, that they have in the capital stock of Inland.

of Practice, which included a petition for extraordinary relief, for reconsideration, for continuance of temporary authority and for approval of the transaction in the *control* case. Replies to the petition have been filed by Alamo Express, Inc., Red Arrow Freight Lines, Inc., and Brown Express, Inc. A motion to strike, or in the alternative, to deny the petition, has been filed by Southwestern Motor Transports, Inc. In view of the action herein, the latter pleading will be considered as a reply to the petition.

Upon reconsideration of the record of the petition of applicants-respondents, and of the replies of protestants, for reasons hereinafter discussed, the provisions of rule 1.101(e) of the General Rules of Practice are waived, the petition of applicants-respondents for reopening and reconsideration, dated January 14, 1964, is accepted for filing and the proceedings are reopened for reconsideration on the present record. The order of November 15, 1963, which accompanied the *second prior report*, has been stayed. The facts are adequately set forth in the *first* and *second prior reports* and will not be repeated herein except to the extent necessary for clarity of discussion.

In substance, it was found in the *second prior report*, following the decision of the United States Supreme Court in *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, decided December 31, 1962, that certain practices integrating the management and operation of Central and Inland could conceivably be eliminated, leaving Inland free to be operated independently of Central and persons in control of or

affiliated with Central, and that respondents should be free to employ any lawful means to prevent any further violation, upon termination of the temporary authority in the *control* case, rather than be limited exclusively to divestiture. In the *first prior report*, it was concluded that the action of the parties in effecting unlawful control or management of Inland in a common interest with Central was not in such disregard of the act as to warrant a conclusion that Central is unfit to acquire control of Inland, not so severe as to bar approval of the *control* case if it could otherwise be found to be consistent with the public interest; and that such finding could not be made since the severance of Inland's interstate and corresponding intrastate operating rights had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce.

Recapitulating some of the facts in these proceedings, Gillen acquired the capital stock of Inland from James S. McNamara, who had in turn acquired the stock from J. H. Robinson, now deceased. Robinson, while in control of Inland, had caused the grant of long-term leases of Inland's intrastate Texas operating authority to Alamo and Southwestern, and thereafter personally acquired, pursuant to an order of the Railroad Commission of Texas, the reversionary interest in the operating rights, subject to the leases. Such reversionary interest now belongs to Robinson's estate. Southwestern and Alamo are utilizing the said leased intrastate rights for performance of interstate operations, under the "grandfather" clause of section 206(a)(7) of the act. For reasons set forth in the

first and *second prior reports*, the above described separation of intrastate rights from interstate rights formed the basis for denial of the *control* application.

In the instant petition, applicants-respondents contend that at the time of the *second prior report*, the status of Central's purchase of Alamo[3] was in doubt due to litigation in the Federal Courts and the Texas State Courts; that the Federal Court litigation has been resolved in favor of Central, so that Commission approval of the transaction is now unchallenged; that in June 1963, the State Court awarded Central specific performance of its contract for the purchase of the stock of Alamo; that Hart (a selling stockholder of Alamo) was ordered to close with Central on 47.4 percent of the stock of Alamo, which has been done, and directed Mrs. J. L. Walker to exchange the remainder of Alamo's stock with Central upon the initial payment thereon being made; that Central has deposited the initial payment with the Court; that the said Mrs. J. L. Vernie Walker has appealed the state court decision; that a decision of the appellate court is expected before the court's summer recess; and that should an appeal be taken to the Supreme Court of Texas, it is anticipated that a final decision from that court will be issued in 1964.

They further contend that there is no market for the interests of Gillen and Callan in Inland; that efforts to dispose of such interests have been unavail-

[3]By report and order on further hearing, 75 M.C.C. 731, decided January 22, 1959, as modified by order of June 4, 1959, and as affirmed and clarified by supplemental report and order on further hearing, 90 M.C.C. 96, decided February 19, 1962, the Commission conditionally approved the acquisition by Central of control of Alamo.

ing; that Central is negotiating with Mrs. J. H. Robinson for purchase of the reversionary interest in Inland's intrastate rights; and that if such negotiations are successful and Central is authorized to control Inland, a reunification of the latter's intrastate and interstate rights would be made possible. They further contend that Central is willing to have approval of its acquisition of control of Inland conditioned upon the elimination of any duplication between the rights in any Inland-owned certificates and intrastate rights now leased to Southwestern and upon reunification, for at least the term of the current lease, of Inland's interstate rights with the intrastate rights now leased to Alamo, as well as any duplication between Central's rights and those of Inland.

They further contend that the factual circumstances in the *control* case here under consideration are significantly different from those present in *Yellow Transit Freight Lines, Inc.—Purchase (Portion) —Inland Motor Freight Lines, Inc. (Frank Brackney, receiver)*, 65 M.C.C. 775, herein called the *Yellow Transit* case; that it was in error for Division 3 to deny the instant application on the ground of the *Yellow Transit* case; that where the sole ground for denial of a transaction is an erroneous one, simple justice requires that reconsideration be granted; that reconsideration by the entire Commission is warranted so that a fair result can be achieved and a decision issued which will clarify the obvious limitations on the split-off doctrine. Applicants-respondents further contend that the separation of Inland's rights was accomplished many years ago by strangers to the

instant agreement; that in *Courier Exp., Inc.—Purchase—Huber Motor Transp. Co.*, herein called the *Courier case*, 45 M.C.C. 688, relied on by Division 3 in denying the instant application, the person or parties responsible for accomplishing the separation of intratstate rights from interstate rights was one of the parties to the transaction proposed for Commission approval; that none of the applicants-respondents had any connection with the separation of Inland's rights; that the instant transaction is more like the situation present in *Shein's Exp. — Purchase — Leo Smith Forwarding Co., Inc.*, herein called the *Shein's* case, 80 M.C.C. 511, where the parties responsible for a separation of operating rights were not parties to the transaction presented for approval; that in the *Shein's* case, the Commission stated "the situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved"; that a separation of operating rights accomplished by parties not here before the Commission is no ground for denying the transaction, especially where the transaction has otherwise been found to be consistent with the public interest; that approval of the instant transaction offers the only real possibility of curing the ancient split of rights, since Central, upon completing the purchase of Alamo will ultimately bring together the interstate operating rights of Inland and its intrastate rights leased to Alamo; that Central is willing to eliminate all duplication between the Inland-owned certificates and its former intrastate rights; and that thereupon the situation upon which the Com-

mission predicated its split-off doctrine will be eliminated.

Protestants contend, generally, that the contentions and arguments of applicants-respondents are substantially the same as presented in their previous pleadings; that applicants-respondents have presented nothing new or extraordinary with respect to the findings and conclusions of Division 3, which would warrant reconsideration of the proceedings; and that the petition for reconsideration being one by the same parties upon substantially the same grounds as previous petitions filed by applicants-respondents is successive and should be rejected.

The finding in the *first* and *second prior reports* that the common control and management of Central and Inland had been effectuated is not contested by applicants-respondents in their pleading here considered and will not be further discussed.

After a careful review of the evidence of record, we have reopened these proceedings primarily due to the fact that in reaching our prior decisions herein, no consideration was given to *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc., supra.* In that case, as here, the separation of intrastate from interstate rights resulted in the creation of two interstate rights where previously only one existed. It was established that none of the parties before the Commission in the *Shein's* case were responsible for the creation of the two rights. In the instant proceedings, the action of Inland in leasing its intrastate operating rights to Alamo and Southwestern was dictated by Robinson,

who long since severed his connection with Inland. No representative of Robinson's estate, nor Alamo or Southwestern are here before the Commission as applicants and approval of the *control* case will not result in any benefit to any of them. In the absence of evidence to the contrary, or of any misconduct by Alamo or Southwestern, or their stockholders, the Commission has no authority to require them to discontinue operations under the proviso. *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc., supra.* The evidence here does not establish that either those persons who controlled Inland both prior to and following the sale of its stock to Gillen, or Central, conspired with Robinson to effect a separation of Inland's intrastate from its interstate operating rights. In the *Shein's* case, Division 4 stated at page 517:

> Applicants herein are not to be penalized because the action of Smithsons and members of the Smith family in disposing of Ontario has resulted in the creation of two interstate operations where before there was only one. The situation here is distinguishable from the *Courier* case and other cases cited by protestants wherein the offending carriers were parties to the proceeding involved.

We, therefore, do not believe the objection raised in the *Yellow Transit* case was appropriately invoked in the instant matter, but rather that the *Shein's* case is dispositive of the *control* case here under consideration.[4] Moreover, approval of the control case is a step

[4]The *Yellow Transit* case makes no mention of individual responsibility, but that application was not denied solely because of the split-off as was the instant transaction. Also, even though Inland may be technically an "offending" carrier party to this proceeding, we do not think

in the direction of a possible permanent reunification of a significant part of the severed rights of Inland, and would thus be an improvement over the status quo.

In the *Shein's* case, no operating rights of either party to the transaction there were cancelled merely because of the creation of two interstate operating rights as a result of the separation of intrastate from interstate rights. Neither will our approval of the *control* case herein be conditioned upon the cancellation of any duplicate operating rights which have been created as a result of the separation of Inland's intrastate from its interstate rights, nor under the test of substantiality do we see any basis for a finding of dormancy in respect of portions of the rights of Inland.

Inland's interstate rights connect with those of Central at Austin, San Antonio, and Houston, and duplicate those of Central between Austin and San Antonio. Following our practice of not approving transactions which would result in the creation, preservation or extension of duplicating operations by separate motor carriers under common control, except in unusual circumstances not present here, our approval herein will be conditioned to require the can-

---

that the fiction of separate corporate identity should be carried to the extreme of forever labeling Inland as an "offending" carrier. In fact, Inland under the control of Gillen or Central is no more responsible for the split-off than were applicants in the Shein's case responsible for the split-off therein considered. Moreover, the repeal of the former second proviso of section 206(a)(1) of the act and the new provisions of sections 206(a)(6) and (7) effective October 15, 1962, were not considered in the *first* and *second prior reports*. Under the new provisions of the act the opportunities for split-offs of the nature here involved have been materially reduced if not totally eliminated.

cellation of Inland's authority between San Antonio and Austin.

Upon reconsideration:

We find, in No. MC-F-7882, that acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of capital stock, and the acquisition by W. W. Callan of control of the latter, through the transaction, upon the terms and conditions set forth herein and in the reports in 90 M.C.C. 777 and 93 M.C.C. 411, which terms and conditions are found to be just and reasonable, constitute a transaction within the scope of section 5(2)(a), and will be consistent with the public interest; *provided, however*, that if the authority granted in No. MC-F-7882 is exercised, that concurrently therewith, the operating rights of Inland Motor Freight Lines, Inc., granted in No. MC-4943, authorizing the transportation of general commodities, with exceptions, over a regular route, between San Antonio and Austin, Tex., serving all intermediate points and the off-route point of Redwood, Tex., shall be cancelled.

We further find, in No. MC-F-7682, that the control and management of Inland Motor Freight Lines, Inc., in a common interest with Central Freight Lines, Inc., was effectuated in violation of section 5(4) of the act, and that the said violation continued until September 5, 1961, when it was terminated by the grant of temporary control authority in No. MC-F-7882; and that the investigation should be discontinued upon exercise of the authority granted in No. MC-F-7882.

An appropriate order will be entered.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of June, A. D. 1964.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FRIEIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Further investigation of the matters and things involved in these proceedings having been made, and the said Division, acting as an Appellate Division, on the date hereof, having made and filed a further report on reconsideration containing its findings of fact and conclusions thereon, which report and the prior reports in 90 M.C.C. 777 and 93 M.C.C. 411 are hereby made a part hereof:

It is ordered, That the provisions of rule 1.101(e) of the General Rules of Practice be, and they are hereby, waived; that the petition of applicants-respondents, Central Freight Lines, Inc., of Waco, Tex., Inland Motor Freight Lines, Inc., of Corpus Christi, Tex., W. W. Callan and R. H. Linam, both also of Waco, and Blake Gillen, also of Corpus Christi, for extraordinary relief, for reconsideration, for continuance of temporary authority, and approval of the acquisition of control by Central Freight Lines, Inc.,

of Inland Motor Freight Lines, Inc., and replies thereto by Alamo Express, Inc., Southwestern Motor Transport, Inc., Brown Express, Inc., and Red Arrow Freight Lines, Inc., protestants, be, and they are hereby, accepted for filing; and that the proceedings be, and they are hereby, reopened for reconsideration on the present record.

It is further ordered, That, in No. MC-F-7682, the investigation proceeding be, and it is hereby, discontinued effective upon consummation of the transaction authorized in No. MC-F-7882.

It is further ordered, That, in No. MC-F-7882, the acquisition by Central Freight Lines, Inc., of control of Inland Motor Freight Lines, Inc., through purchase of its capital stock, and in turn, the acquisition by W. W. Callan, through the transaction of control of the latter, be, and the same are hereby, approved and authorized, subject to the terms and conditions set out in the findings in said report.

It is further ordered, That if the parties to the transaction authorized in No. MC-F-7882 desire to consummate same, they shall confirm in writing to the Commission, immediately after consummation, the date on which consummation has actually taken place.

It is further ordered, That the authority granted in No. MC-F-7882 shall not be exercised prior to the effective date hereof, and that this order shall be effective 35 days from the date of service thereof.

It is further ordered, That, if the authority granted in No. MC-F-7882 is exercised, Central Freight Lines, Inc., shall submit for consideration a sworn state-

ment, and one copy thereof, showing all expenditures made, by date, or to be made, in connection with the transaction authorized, including the consideration, legal and other fees, commissions, witness fees, and any other costs incidental to the transaction, the assets acquired and the liabilities assumed, indicating the account number and title to which each item has been, or is to be, debited or credited.

It is further ordered, That unless the authority granted in No. MC-F-7882 is exercised within 90 days from the effective date hereof, this order shall be of no further force or effect.

It is further ordered, That effective with consummation of the transaction authorized in No. MC-F-7882, or 90 days from the effective date hereof, whichever first occurs, the authority granted by order of September 5, 1961, as extended by order of February 16, 1962, authorizing the temporary control through management by Central Freight Lines, Inc., of Inland Motor Freight Lines, Inc., shall be of no further force or effect; and

It is further ordered, That recital in said reports of balance sheet and other financial data shall not be construed as approving accounting methods which have been followed, or expenditures represented thereby.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

ORDER

SERVICE DATE
OCTOBER 21, 1964

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, acting as an Appellate Division, held at its office in Washington, D. C., on the 20th day of October, A. D. 1964.

No. MC-F-7882

CENTRAL FREIGHT LINES, INC.—CONTROL—INLAND MOTOR FREIGHT LINES, INC.

No. MC-F-7682

CENTRAL FREIGHT LINES, INC.—INVESTIGATION OF CONTROL—INLAND MOTOR FREIGHT LINES, INC.

Upon consideration of the record in the above-entitled proceedings, and

(1) of the petitions of protestants, Southwestern Motor Transport, Inc., embracing a request for oral argument; of Alamo Express, Inc.; and jointly of Red Arrow Freight Lines, Inc., and Brown Express, Inc., for reconsideration of the second report on reconsideration of Division 3, acting as an Appellate Division, decided June 29, 1964,

(2) of the reply of applicants-respondents, and

It appearing, That the order of June 29, 1964, reopening the proceedings was within the Commission's discretion; that the findings of fact and conclusions

of the said Division are supported by the evidence of record; and that no fact or substantial argument have been advanced by protestants which would warrant reconsideration or oral argument:

It is ordered, That the petitions be, and they are hereby, denied; and

It is further ordered, That the order of June 29, 1964, shall be effective 20 days from the date this order is served.

By the Commission, Division 3, acting as an Appellate Division.

HAROLD D. McCOY,
Secretary.

[SEAL]

APPENDIX B

APPLICABLE RULES FROM GENERAL RULES OF PRACTICE BEFORE THE INTERSTATE COMMERCE COMMISSION.

Rule 1.101(a)(3):

"(3) *Limitations on petitions for review of division decisions.* Pursuant to authority granted in section 17(b) of the Interstate Commerce Act, the right to apply to the entire Commission for rehearing, reargument, or reconsiderations of a decision, order, or requirement of a division of the Commission in any proceeding shall be limited to those proceedings in which the entire Commission on its own motion, determines and announces that an issue of general transportation importance is involved. In proceedings in which no such announcement has been made, but in which a division reverses, changes or modifies a prior decision by a hearing officer or where the initial decision is made by a division, a petition to the same division for rehearing, reargument, or reconsideration of its decision will be permitted and will be considered and disposed of by such division in an appellate capacity and with administrative finality."

Rule 1.101(e):

"(e) *Time for Filing.* Except for good cause shown, and upon leave granted petitions under this section must be filed within 30 days after the date of service of a decision or order."

Rule 1.101(f):

"(f) *Successive Petitions On Same Ground Not En-*

tertained. A successive petition under this section submitted by the same party or parties, and upon substantially the same ground as a former petition, which has been considered and denied by the entire Commission will not be entertained."

APPLICABLE SECTIONS OF THE UNITED STATES CODE, TITLES 5, 28, and 49.

Title 5 U.S.C. §1008(b):

"(b) LICENSES . . . In any case in which the licensee has, in accordance with agency rules, made timely and sufficient application for a renewal or a new license, no licenses with respect to any activity of a continuing nature shall expire until such application shall have been finally determined by the agency."

28 U.S.C. §1253:

"Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges."

Title 28 U.S.C. §1336:

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the Interstate Commerce Commission."

Title 28 U.S.C. §1398:

"Except as otherwise provided by law, any civil action to enforce, suspend, or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action."

Title 28 U.S.C. §2101(b):

"(b) any other direct appeal to the Supreme Court which is authorized by law, from a decision of a district court in a civil action, suit or proceeding, shall be taken within thirty days from the judgment, order or decree, appealed from, if interlocutory, and within sixty days if final."

Title 28 U.S.C. §2321:

"The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties, and forefeitures, shall be as provided in this chapter. The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43 of Title 49, run, be served, and be returnable anywhere in the United States."

Title 49 U.S.C. §5(2):

"(a) It shall be lawful, with the approval and authorization of the Commission as provided in subdi-

vision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

* * *

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for pub-

lic hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable; *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the pro-

posed transaction; and (4) the interest of the carrier employees affected.

"(d) * * *

"(e) No transaction which contemplated a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or assumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

* * *"

Title 49 U.S.C. §5(4):

"It shall be unlawful for any person, except as provided in paragraph (2), to enter into any transaction within the scope of subparagraph (a) thereof, or to accomplish or effectuate, or to participate in accomplishing or effectuating, the control or management in a common interest of any two or more carriers, however such result is attained, whether directly or indirectly, by use of common directors, officers, or stockholders, a holding or investment company or companies, a voting trust or trusts, or in any other manner whatsoever. It shall be unlawful to continue to maintain control or management accomplished or effectuated after the enactment of this amendatory paragraph and in violation of its provisions. As used

in this paragraph and paragraph (5), the words 'control or management' shall be construed to include the power to exercise control or management."

Title 49 U.S.C. §5(6):

"For the purposes of this section a person shall be held to be affiliated with a carrier if, by reason of the relationship of such person to such carrier (whether by reason of the method of, or circumstances surrounding organization or operation, or whether established through common directors, officers, or stockholders, a voting trust or trusts, a holding or investment company or companies, or any other direct or indirect means), it is reasonable to believe that the affairs of any carrier of which control may be acquired by such person will be managed in the interest of such other carrier."

Title 49 U.S.C. §5(7):

"The Commission is hereby authorized, upon complaint or upon its own initiative without complaint, but after notice and hearing, to investigate and determine whether any person is violating the provisions of paragraph (4). If the Commission finds after such investigation that such person is violating the provisions of such paragraph, it shall by order require such person to take such action as may be necessary, in the opinion of the Commission, to prevent continuance of such violation. The provisions of this paragraph shall be in addition to, and not in substitution for, any other enforcement provisions contained in this part; and with respect to any violation of paragraphs (2)

to (12), inclusive, of this section, any penalty provision applying to such a violation by a common carrier subject to this part shall apply to such a violation by any other person."

Title 49 U.S.C. §17(6):

"After a decision, order, or requirement shall have been made by the Commission, a division, an individual Commissioner, or a board, or after an order recommended by an individual Commissioner or a board shall have become the order of the Commission as provided in paragraph (5), any parties thereto may at any time, subject to such limitations as may be established by the Commission as hereinafter authorized, make application for rehearing, reargument, or reconsideration of the same, or of any matter determined therein. Such applications shall be governed by such general rules as the Commission may establish . . ."

Title 49 U.S.C. §17(9):

"When an application for rehearing, reargument, or reconsideration of any decision, order, or requirement of a division, an individual Commissioner, or a board with respect to a matter assigned or referred to him or it shall have been made and shall have been denied, or after rehearing, reargument, or reconsideration otherwise disposed of, by the Commission or an appellate division, a suit to enforce, enjoin, suspend, or set aside such decision, order, or requirement, in whole or in part, may be brought in a court of the United States under those provisions of law applicable in the case of suits to enforce, enjoin, suspend, or set

aside orders of the Commission, but not otherwise."

Title 49 U.S.C. §306(a)(1):

"Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there be in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations. . . . this paragraph shall not be so construed as to require any such carrier lawfully engaged in operations only within any State to obtain from the Commission a certificate authorizing the transportation of such carrier of . . . property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

Title 49 U.S.C. §306(a)(7)(B):

"All rights to engage in operations in interstate and foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before the date of the enactment of this paragraph, shall cease and terminate, but any carrier lawfully engaged in interstate and foreign operations on the date of the enactment of this paragraph or any carrier who would have been so lawfully

engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, pursuant to such provisions, may continue such operations for 120 days after such date, and, if an appropriate application for a certificate of registration is filed within such period, such operations may be continued pending the determination of such application. The Commission shall prescribe the form of such application, the information and documents to be furnished, the manner of filing, and the persons to whom or the manner of giving notice to interested persons of such filing. Issues arising in the determination of such applications shall be determined in the most expeditious manner, and so far as practicable and legally permissible, without formal hearings or other proceedings. A notice of intent to engage in interstate and foreign operations accompanied by certified copies of effective, lawfully issued or acquired State certificates filed with the Commission as evidence of authority to operate in interstate or foreign commerce under the provisions of the second proviso of paragraph (1) of this subsection, has in effect immediately before the date of the enactment of this paragraph, shall be conclusive proof that the applicant is lawfully engaged in interstate and foreign operations and the scope thereof."

Title 49 U.S.C. §310a(b):

"Pending the determination of an application filed with the Commission for approval of a consolidation or merger of the properties of two or more carriers,

or of a purchase, lease, or contract to operate the properties of one or more motor carriers, the Commission may, in its discretion, and without hearings or other proceedings, grant temporary approval, for a period not exceeding one hundred and eighty days, of the operation of the motor carrier properties sought to be acquired by the person proposing in such pending application to acquire such properties, if it shall appear that failure to grant such temporary approval may result in destruction or injury to such motor carrier properties sought to be acquired, or to interfere substantially with their future usefulness in the performance of adequate and continuous service to the public."

Office-Supreme Court, U.S.
FILED
AUG 2 1965
JOHN F. DAVIS, CLERK

No. 357

In the

Supreme Court of the United States

OCTOBER TERM, 1965

ALAMO EXPRESS INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., AND SOUTHWESTERN MOTOR TRANSPORT, INC.,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND CENTRAL FREIGHT LINES INC., W. W. CALLAN AND INLAND MOTOR FREIGHT LINES, INC.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

MOTION TO AFFIRM

RICHEY, SHEEHY, TEELING & CURETON,
8th Floor, Liberty Building,
Waco, Texas,
Attorneys for Appellees, Central Freight Lines Inc. and W. W. Callan.

WARLICK PRESS, INC.—2263 VALDINA STREET—DALLAS—NE 1-3130

No. .....

In the

Supreme Court of the United States

OCTOBER TERM, 1965

ALAMO EXPRESS INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., AND SOUTHWESTERN MOTOR TRANSPORT, INC.,

Appellants,

v.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION AND CENTRAL FREIGHT LINES INC., W. W. CALLAN AND INLAND MOTOR FREIGHT LINES, INC.,

Appellees.

On Appeal from the United States District Court for the Western District of Texas, San Antonio Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, CENTRAL FREIGHT LINES INC. and W. W. CALLAN move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge District Court affirming the orders of the Interstate Commerce Commission and dissolving a temporary injunction in an action by Appellants to set aside orders of the Interstate Commerce Commission (239 Fed. Sup. 694).

These orders originated pursuant to an application by CENTRAL FREIGHT LINES INC. and W. W. CALLAN for approval of acquisition by CENTRAL FREIGHT LINES INC. of control of INLAND MOTOR FREIGHT LINES INC. through purchase of capital stock, and, in turn, by W. W. CALLAN, by virtue of the transaction.

After having considered the record on three separate occasions in three reports and orders, Division 3 of the Commission, acting as an appellate division, ultimately concluded by order of June 29, 1964, that acquisition by Central Freight Lines Inc. of control of Inland Motor Freight Lines Inc., through purchase of capital stock, constitutes a transaction within the scope of Section 5(2)(a) of the Interstate Commerce Act and will be consistent with the public interest and should be approved and authorized subject to a condition.

The Appellants contended, with success until the orders in question were granted, that a prior separation of intrastate from interstate rights by Inland to Appellant, Alamo Express, Inc. and Appellant, Southwestern Motor Transport, Inc., should result in denial of Central's and Callan's application to control Inland because such separation of rights contra-

vened an established policy of the Commission, declining to approve transactions where the severance of interstate and corresponding intrastate rights, previously operated by a single carrier, resulted in the creation of two rights and two operations in the place of one. However, the Commission ultimately accepted a second petition for reconsideration filed by Central and Callan, pointing out an *overlooked* exception to the "split-off" policy of the Commission, the exception being expressed in *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, wherein the parties before the Commission were "non-offending" parties and unconnected with the split-off.

The proceeding was instituted in the United States District Court for the Western District of Texas, San Antonio Division, seeking to set aside, enjoin and annul the orders of the Interstate Commerce Commission entered on June 29, 1964 approving the transaction and the order of October 29, 1964 denying the Petition for Reconsideration. The basic contentions of the Appellants can be summarized as follows:

(1) Whether the Commission exceeded its statutory jurisdiction, abused its discretion and acted unlawfully in accepting Central's second petition for reconsideration and extraordinary relief, and in reopening the "control case" proceeding for reconsideration of the record in light of a controlling but overlooked prior Commission decision setting forth an exception to the Commission's general policy in a Section 5 transaction where there has been a split-off of intrastate and interstate operating rights.

(2) Whether the Commission's ultimate conclusion, upon reconsideration, in reversing prior denials of authority and approving and authorizing the transaction under Section 5(2)(a) as consistent with the public interest, is rational, based upon adequate findings and supported by substantial evidence.

SCOPE OF REVIEW

The opinion of the United States District Court quite adequately defines the function of courts in reviewing Interstate Commerce Commission orders. This is perhaps best summarized in a quotation from *McLean Trucking Co., Inc. v. United States*, 321 U.S. 67, at 87 (1944):

> "* * * if the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

This principle is supported by other authorities cited by the District Court.

CONTINUING JURISDICTION OF INTERSTATE COMMERCE COMMISSION

Appellants attack the acceptance by the Commission of the second petition for reconsideration filed prior to the effective date of the Commission's then existing orders which set forth for the first time an overlooked but well-recognized exception to the Commission's "split-off" policy.

The Commission has consistently held that any of its decisions or orders may be reopened or reconsidered at any time, *American Packing & Provision Co. v. Union Pacific*

R.R. Co., 216 I.C.C. 613, 614-616; and *Abco Moving & Storage Co., Inc.—Purchase—Wm. Dierking*, 47 M.C.C. 557, 567, and cases cited.

The Interstate Commerce Act, particularly Sections 17(6), 17(7) and 17(8) and 221(b), clearly give the Commission continuing jurisdiction over its orders and empowers it to reconsider and rescind, change or modify them at any time. This is the holding of *Baldwin v. Scott County Milling Co.*, 307 U.S. 478 and *Sprague v. Woll*, 122 Fed. 2d 128 (CCA-7th), certiorari denied 314 U.S. 669, wherein the Court quotes old Section 16(a) of the Act (now revised and incorporated in Section 17(6), (7) and (8) of the present Act). See also *Riss & Company v. United States*, 100 Fed. Sup. 468, 474.

APPROVAL OF CONTROL

The Commission's prior report of January 11, 1963 makes it clear that the main basis for denial of control was its general policy against approving split-offs. However, this decision was reversed when an overlooked exception to the split-off doctrine was called to the Commission's attention in the second petition for reconsideration. This was the exception expressed in *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511. The Commission found that the parties to this application were not responsible for the original split-off and that Inland no longer owned or controlled the reversionary interest in the leased intrastate certificates.

Approval by the Commission here neither caused, created, permitted, perpetuated nor sanctioned the severance of Inland's intrastate or interstate rights; and a denial would not have permitted, eliminated, discontinued or cured the split-off.

Strangely enough, Appellants, Alamo Express, Inc. and Southwestern Motor Transport, Inc., who were offending parties in the original split-off, were before the Commission as protestants and are plaintiffs and appellants in this cause.

The split-off doctrine was the result of the "second proviso" and the provisions for registrations of intrastate certificates contained in 49 USCA 306(a)(6)(7), which was *repealed* effective October 15, 1962. The repeal effectively precludes any further split-off.

This former Act of Congress permitted split-offs by authorizing, without restriction, the registration of intrastate certificates of public convenience and necessity and conducting interstate operations thereunder by carriers operating wholly within a state. The "split-off doctrine" was an Interstate Commerce Commission policy and not the result of an Act of Congress. The Commission had previously recognized an exception to this policy in the Shein case, 80 M.C.C. 517, finding therein that the immediate applicants were not parties to the split-off and were not offending parties.

Likewise, the Commission in the instant case found that the applicants were not responsible for the split-off and were

not offending parties and that this exception to the policy was applicable.

CONCLUSION

The appeal presents no substantial issue warranting plenary consideration and the judgment of the Court below should be affirmed.

Respectfully submitted,

RICHEY, SHEEHY, TEELING & CURETON,
8th Floor, Liberty Building,
Waco, Texas,

By W. E. Cureton
Of Counsel

Attorneys for Appellees,
Central Freight Lines Inc. and
W. W. Callan.

PROOF OF SERVICE

I, W. E. CURETON, attorney for CENTRAL FREIGHT LINES INC. and W. W. CALLAN, Appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July 30, 1965, I served copies of the foregoing Motion to Affirm on the Appellants by depositing the same in the United States Mail, with first-class postage prepaid, addressed to counsel of record for Appellants to each of them at the following post office addresses:

Reagan Sayers
303 Century Life Bldg.
Fort Worth, Texas 76102

Ewell H. Muse, Jr.
415 Perry Brooks Bldg.
Austin, Texas 78701.

W. E. Cureton

8th Floor, Liberty Building,
Waco, Texas,

Counsel for Appellees,
Central Freight Lines Inc. and
W. W. Callan.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 357

ALAMO EXPRESS, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, SAN ANTONIO DIVISION

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing an action brought by appellants to set aside orders of the Interstate Commerce Commission. The Commission's orders approved, under Section 5(2)(a) of the Interstate Commerce Act, 49 U.S.C. 5(2)(a), the ac-

quisition by Central Freight Lines, Inc. ("Central") of control of Inland Motor Freight Lines, Inc. ("Inland"), through purchase of capital stock. The principal issue in the Commission proceedings was whether the acquisition of control should be disapproved because Inland previously had transferred its state-granted intrastate operating rights to appellants Alamo Express, Inc. and Southwestern Motor Transport. Under Section 206 of the Commerce Act (49 U.S.C. 306) as it read before 1962, the holder of an intrastate certificate could use it for transporting goods moving in interstate commerce and could transfer such certificate while retaining a corresponding interstate certificate, as Inland did, thus creating two operating authorities in place of one.[1] To discourage this, the Commission followed the policy of declining to approve under Section 5 any transfers involving the severance of interstate and corresponding intrastate operating rights[2] except when the parties before it were not responsible for the split-off and creation of duplicate rights[3] and the transaction was otherwise consistent with the public interest.

---

[1] Split-offs were expressly barred by the 1962 amendment to Section 206(a), 49 U.S.C. 306(a), 76 Stat. 911, *infra*, pp. 7-8.

[2] See, *e.g.*, *Associated Transport, Inc.—Purchase—Russell*, 55 M.C.C. 177, 183 and cases cited; *Southern Pacific Transport Co.—Purchase (Portion)—Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 M.C.C. 775, 779; *Navajo Freight Lines, Inc.* v. *United States*, 186 F. Supp. 377, 381-383 (D. Colo., 1960).

[3] *Shein's Express—Purchase—Leo Smith Forwarding Co., Inc.*, 80 M.C.C. 511, 517.

The pertinent facts in the instant case may be summarized as follows. In 1960 the Commission instituted a proceeding to determine whether Central had, without prior Commission approval, acquired unlawful control of Inland. Central then applied for authority to acquire control of Inland through stock ownership, and obtained temporary authority to control under Section 210a(b) of the Act. On January 11, 1963, the Commission issued a single report disposing of both the investigation and the control proceedings (J.S. A-12), in which it found that Central had indeed acquired unlawful power to control Inland through its relationship with Inland's present owner, and denied Central's application to control Inland on the ground that there had been a prior split-off of Inland's intrastate operating rights (J.S. A-37). The split-off had been accomplished by Inland's prior owner Robinson (now deceased), who had leased its intrastate rights to appellants Alamo and Southwestern on a long-term basis. Subsequently, Robinson sold the capital stock of Inland to McNamara who in 1957 sold it to Gillan, from whom Central sought to acquire it (J.S. A-17). The reversionary interest in the leased intrastate rights now belongs to Robinson's estate.

In its initial opinion, the Commission directed Central, its principals, and Gillen, Inland's owner, to divest themselves of all direct or indirect interest in the capital stock of Inland (J.S. A-38-39). Upon reconsideration, the Commission affirmed the denial of control but modified its order to permit use of any law-

ful means to eliminate the violation without the necessity of complete divestiture (J.S. A-42).[4]

Thereafter Central and its principals, prior to the effective date of the Commission's order, filed a petition for extraordinary relief and for waiver of the agency's rule setting time limits for petitions for reconsideration (ICC Rule 1.101(e)). This petition was granted and the Commission again reopened the proceedings because, in reaching its prior decisions, no consideration had been given to whether the parties before it were implicated in the split-off, a factor pertinent under the Commission's *Shein's Express* decision, *supra*, fn. 3 (J.S. A-50). Finding that the appellants were not responsible for the split-off and that the transaction was otherwise consistent with the public interest, the Commission reversed its prior denials and granted Central authority to control Inland through the purchase of capital stock (J.S. A-51).

On appeal, the district court concluded (J.S. A-7) that the Commission had authority to reconsider and modify its prior orders and did not abuse its discretion in so doing here, and that the Commission's approval of the transaction as consistent with the public interest was supported by substantial evidence and within the Commission's lawful discretion.

---

[4] The modification was necessary in order to conform to this Court's decision in *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115.

ARGUMENT

The decision below is correct, and the case presents no question substantial enough to warrant plenary consideration by this Court.

1. In a determination whether an acquisition subject to Section 5(2) should be approved as consistent with the public interest, "[t]he statute entrusts the Commission with the duty to decide what considerations * * * shall be given weight." *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115, 127. Thus, it is for the Commission to determine whether approval should be granted notwithstanding a prior unlawful acquisition. See *id.* at 128-129. The Commission found that the prior unlawful acquisition here was not so flagrant as to demonstrate that Central was unfit to acquire control of Inland (J.S. A-32, 36). It also found that Inland's operating rights had not been dormant (*i.e.*, inactive) during 1957-1961 [5] and that, since the present owners of Inland and the applicants were not responsible for the split-off of Inland's operating rights, the split-off was not a bar to approval but came within the exception to the strict policy against split-offs announced in *Shein's Express—Purchase—Leo Smith Forwarding*

[5] Appellants claim (J.S. 18-20) that total dormancy existed as a matter of law. But simply because Central had the power to control Inland did not, as appellants argue, make the operations conducted by Inland unlawful or dormant (J.S. A-10, 36). The operations conducted by Inland were found to be in fact commensurate with its resources and facilities and not influenced by Central to any great extent (J.S. A-36).

Co., Inc., 80 M.C.C. 511, 517. The court below upheld these findings, concluding that the approval of Central's acquisition of control of Inland was supported by substantial evidence on the record considered as a whole and was in accordance with law (J.S. A-6, 8-10); the court specifically found that the Commission's application of the *Shein's* exception to the facts of the case represented a reasonable policy determination within the area committed by the statute to the Commission's discretion (J.S. A-9). There is no basis for this Court to depart in the present case from its general rule that the reviewing court's determination of whether the agency's findings are supported by substantial evidence is final, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491, or to disturb the Commission's appraisal of the public interest, convenience, and necessity—a matter peculiarly for expert administrative judgment. See *Gilbertville Trucking Co.* v. *United States*, 371 U.S. 115; *Minneapolis & St. Louis R. Co.* v. *United States*, 361 U.S. 173.

2. Appellants complain (J.S. 9-13) that the Commission's order upon its first reconsideration, which affirmed the denial of the control application, was a "final order", and that granting the subsequent petition for extraordinary relief violated Rule 1.101(f) of the Commission's General Rules of Practice against entertaining "successive" petitions "upon substantially the same ground". But appellees' petition for extraordinary relief was not "successive" within the cited rule, since it presented a new ground which

was controlling and had been previously overlooked by the Commission. The Commission acted before its order denying the control application became effective and so before appellants could be prejudiced as a result of justified reliance on the order. And, as the court below noted (J.S. A-7), the Interstate Commerce Act explicitly gives the Commission continuing jurisdiction over its orders with authority to modify or rescind them at any time (Sections 17(6), 221(b), 49 U.S.C. 17(6), 321(b)), which the Commission properly and sensibly exercised here to correct an error of law stemming from its having overlooked the important *Shein's* precedent. As the district court stated (J.S. A-8), citing *Federal Trade Commission* v. *Weingarten, Inc.*, 336 F. 2d 687, 695-697 (C.A. 5), "self-correction of its own errors through the use of judicial inventiveness and imaginative resourcefulness should be the aim of a well run administrative agency."

3. The principal issue presented by this case is not of continuing concern. Amendments to Section 206, adopted in 1962 (76 Stat. 911), terminated the automatic right of holders of intrastate certificates to use them for transportation in interstate commerce. Since 1962, such interstate operations must be found by the State to be required in the public convenience and necessity, and must be evidenced by ICC certificates of registration which "may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign

rights shall terminate the right to engage in interstate or foreign commerce" (§ 206(a)(6), 49 U.S.C. 306 (a)(6)). Split-offs are therefore no longer a possible source of duplicate interstate operating rights.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

RALPH S. SPRITZER,
Acting Solicitor General.

DONALD F. TURNER,
Assistant Attorney General.

LIONEL KESTENBAUM,
JOHN T. MARSHALL,
Attorneys.

ROBERT W. GINNANE,
General Counsel,

ARTHUR J. CERRA,
Associate General Counsel,
Interstate Commerce Commission.

AUGUST 1965.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 784290 119

No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ALAMO EXPRESS, INC., BROWN EXPRESS, INC., RED ARROW FREIGHT LINES, INC., and SOUTHWESTERN MOTOR TRANSPORT, INC., *Appellants*

vs.

THE UNITED STATES OF AMERICA, THE INTERSTATE COMMERCE COMMISSION and CENTRAL FREIGHT LINES INC., W. W. CALLAN and INLAND MOTOR FREIGHT LINES, INC., *Appellees*

On Appeal From The United States District Court for the Western District of Texas, San Antonio Division

Brief Opposing Motion of Appellees to Affirm

This Reply by Appellants to Motion to Affirm by Appellees Central Freight Lines Inc. and W. W. Callan is filed pursuant to Rule 16.3 of the Revised Rules of this Court.

STATEMENT

Appellants' JURISDICTIONAL STATEMENT at pps. 6-25 fully describes the Statement of the Case herein. The pertinent Commission rules, statutes, decision of the court below, and reports and orders of the Commission complained of and prior thereto, are

included in Appendices A and B of Appellants' JURISDICTIONAL STATEMENT.

The Motion to Affirm filed by Appellees Central Freight Lines, Inc. and W. W. Callan urges as grounds therefor only one subsidiary point dealt with in Appellants JURISDICTIONAL STATEMENT, that the subsequent action of Appellee Interstate Commerce Commission in accepting for filing Central's second petition for reconsideration, in reopening the "control" case, and in granting same after prior effective denial "presents no substatnial issue warranting plenary consideration." This conclusion is urged solely on the basis of the contention that the Commission's long established policy and doctrine of denial of "split-offs" of intrastate and coextensive interstate operating rights is properly subject to an exception herein because applicants "were not offending parties." Such motion wholly fails to treat with or consider the other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court:

(1) The Commission in a prior decision *(Yellow Transit Freight Lines, Inc.-Purchase (Portion)-Inland Motor Freight Lines, Inc. (Frank Brackney, Receiver)*, 65 MCC 775) refused to authorize transfer of the identical "split-off" rights to another carrier where applicants were "not offending parties." Even though the doctrine of stare decisis is not applicable, such action by the Commission in adopting different standards for different applicants in the same situation is to act arbitrarily. *National Labor Relations*

Board v. Mall Tool Co., 119 F. 2d 700; *Tallman v. Udall*, 324 F. 2d 411; *Dixie Highway Express, Inc., et al. v. United States, et al.* ___ F. Supp. ___.

(2) The order of the Commission of July 23, 1963 was a final order, as defined in 49 U.S.C. §17(9), and the jurisdiction of the Commission in the "control" case was terminated by the entry of such order. While conceivably the Commission *on its own motion* might reopen such proceeding otherwise final, the vice herein was in the reopening after finality upon the successive petition of a party, violative of the Commission's own rules.

(3) While the Commission waived its Rule 1.101 (e) permitting of the late filing of applicants' second petition, which action was arbitrary, capricious, and void, nevertheless, it did not waive, nor was waiver sought of, its own Rule 1.101(f), prohibiting the entertainment of a successive petition for reconsideration upon substantially the same ground as a former petition which had been denied by the Commission. Thereby, the orders complained of herein are nullities in law.

(4) Although the Commission waived its Rule 1.101(e) on motion of applicants and permitted of the late filing of a petition for reconsideration, the Commission did not waive, nor was waiver sought by applicants of, its Rule 1.101(a)(3) with respect to the administrative finality of the order of July 23, 1963 denying such "control" application. While conceivably the Commission might have opened such administratively final order on its own motion [*Baldwin v. Scott*

County Milling Co., 307 U.S. 478 (1939); *Sprague v. Woll*, 122 F. 2d 128 (7th Cir. 1941), Cert. denied 314 U.S. 669; and *Erie R. R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S. D. Ohio 1945)], the Commission may grant the application for reconsideration of applicants, under 49 U.S.C. §17(6) only under "such general rules as the Commission may establish," and where, as here, the application for rehearing was granted in violation of the Commission's Rules 1.101(a)(3), 1.101(e), and 1.101(f), the orders here complained of issued in contravention of such statute and such rules are nullities in law.

(5) The orders of the Commission of June 29, 1964 and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable split-off of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant.

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas, Texas.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law.

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines, Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines Inc. that it would be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines, Inc.*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled, although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the split-off intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application, including failure to establish among other things, that the transaction is consistent with the public interest, that the effect of the proposed transaction upon adequate transportation service to the public, that the total fixed charges resulting will not burden Central or Inland, that the interest of carrier employees will not be affected, or that full utility has been made of all operating rights. The record before the Commission was silent with respect to these requisite matters of proof.

It is manifest that the questions on which the decision of this cause depends are so substantial as to require further consideration by this Court.

WHEREFORE, Appellants pray that Appellees' Motion to Affirm be denied and that this Court enter an appropriate order noting probable jurisdiction and that the case shall stand for argument.

Respectfully submitted,

REAGAN SAYERS
303 Century Life Bldg.
Fort Worth, Texas 76102

EWELL H. MUSE, JR.
415 Perry Brooks Bldg.
Austin, Texas 78701
Counsel for Appellants

RAWLINGS, SAYERS, SCURLOCK & EIDSON
Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in the District Court by depositing a copy properly addressed with proper postage affixed in the U.S. mail.

Dated at Fort Worth, Texas this 18th day of August, 1965.

Reagan Sayers

No. 357

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

ALAMO EXPRESS, INC., ET AL, *Appellants*

vs.

THE UNITED STATES OF AMERICA, ET AL, *Appellees*

On Appeal From The United States District Court
for the Western District of Texas
San Antonio Division

BRIEF OF APPELLANTS OPPOSING MOTION OF APPELLEES THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION TO AFFIRM

This brief of Appellants in opposition to the Motion to Affirm, filed by Appellees The United States of America and The Interstate Commerce Commission (Commission) is filed pursuant to Rule 16.3 of the Revised Rules of this Court.

STATEMENT

The control by Central Freight Lines Inc. (Central) of Inland Motor Freight Lines, Inc. (Inland) was first denied by the Commission on January 11, 1963 upon the basis of the Commission's prior holding in *Yellow Transit Freight Lines, Inc. — Purchase (Portion) — Inland Motor Freight Lines, Inc. (Frank*

Brackney, Receiver), 65 MCC 775 (herein called "*Yellow Transit*" case) involving the same Inland carrier, that the transaction may not be sanctioned in the public interest because there had been a severance of interstate and corresponding intrastate rights, theretofore operated by a single carrier, which might or had resulted in the creation of two rights, in place of one, to operate in interstate or foreign commerce over the same highways and between the same points. [J.S. A-12][1, 2] Upon reconsideration, the Commission by order of July 23, 1963, denied applicants' Petition for Reconsideration in the *control* application in all respects but postponed the effective date of the order of January 11, 1963 pending further order [J.S. A-40].

On November 15, 1963, the Commission, in furtherance of its order of July 23, 1963, while modifying the prior divestiture requirement in the report and order of January 11, 1963, did not modify its prior denial of the *control* application [J.S. A-42 et seq.].

On June 29, 1964, the Commission, pursuant to late filed petition by applicants in the *control* application,

---

[1]Appellants JURISDICTIONAL STATEMENT is herein referred to as "J. S."

[2]The Commission's consideration of its *complaint* against applicants for unlawful acquisition of control of Inland contrary to statute in the orders should not serve to confuse the issue in the *control* case. In the *complaint* case the Commission adhered to its original finding of January 11, 1963 that Central and its officers were unlawfully controlling Inland, originally requiring Central and its officers "to dispose of all of their interest, direct or indirect, in Inland or in any of its stock." Subsequently [J.S. A-42 et seq.] on November 15, 1963 the Commission, on the basis of *Gilbertville Trucking Co. v. United States*, 371 U.S. 115 modified the divestiture requirement of the *complaint* cases to permit respondents (applicants in the *control* case) to employ "any lawful means to prevent further violation" rather than limited to divestiture.

reversed its final report and order of January 11, 1963 and granted such *control* application on the basis of *Shein's Exp.—Purchase—Leo Smith Forwarding Co., Inc.*, 80 MCC 511 (Shein's), holding that the doctrine of prohibition of "split-offs", as here, was subject to the exception that it could not be applied where applicants "were not offending parties."[3] [J.S. A-43]. Although the Commission, on motion of applicants, waived its Rule 1.101(e) [J.S. B-1] relaing to late filing of the petition (the vice being in the Commission reopening an order final under Rule 1.101(a) (3) [J.S. B-1] on the motion of a party rather than on its own motion or initiative) but failed to waive, and applicants did not seek waiver of, Rule 1.101 (f) [J.S. B-1, 2] prohibiting the consideration of successive petitions on the "same ground." Appellees admit the *issue* that applicants "were not offending parties," was considered [J.S. A-26 and pp. 413 and 414 following A-42] but contend *Shein's* case was not previously cited. Such consideration is only as to the form and not as to substance, and was not logical rationale.

Appellants filed petitions to the reversal by the Commission in its report and order of June 29, 1964, raising the procedural, rule violations, and statutory objections aforesaid. By order of October 20, 1964 [J.S. A-57] the Commission denied such petition of Appellants, and made effective the order of June 29, 1964.

On appeal the District Court upheld the orders complained of [J.S. A-1], but without consideration of the

[3]Such finding failed to take into consideration that in the *Yellow Transit* case the Commission had found that Inland was an offending party.

violation of Commission's Rules 1.101(a)(3) or 101 (f) [J.S. B-1] or that the reopening of an otherwise final order is permissive *only* on the Commission's own motion and initiative and not by motion of a party. It did not consider that *Yellow Transit* case involved the same rights and the law of the case as here involved and holding Inland an "offending party", so that *Shein's* case was not applicable because Inland was an offending party; nor did it pass on the violation by the Commission of its own rules, without waiver, nor the resulting arbitrary and capricious action of the Commission in ultimately applying the rule of the *Shein's* case when the rule of the *Yellow Transit* case had been adopted and applied to the same rights on prior consideration of another proposed purchaser.

The MOTION TO AFFIRM by Appellees The United States of America and the Interstate Commerce Commission is predicated upon erroneous contentions (1) that the issue is one of substantial evidence and the Commission expertise should not be disturbed; (2) that the granted petition of applicants was not "successive" because it presented "a new ground" under *Shein's* case; and (3) that the "split-off" doctrine is not of continuing concern because as a result of statutory amendment "split-offs are therefore no longer a possible source of duplicate interstate operating rights." Such contentions do not properly appraise the facts, the law, and the Commission orders complained of, nor do they treat with the several other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court as specified below.

ARGUMENT

Appellees' Argument Fallacious.

Appellants admit the propriety of the rule of Commission expertise where the orders are supported by substantial evidence and issued in accordance with law. Here, however, the orders violated procedural statutes and Commission rules.

1. The finding of lack of dormancy of Inland's rights as a matter of fact [J.S. A-52] was predicated upon "the test of substantiality," not defined, and without basic findings with respect to such conclusion. Such conclusion is factually contrary to the basic findings in the January 11, 1963 report [J.S. A-35, 36], not overruled, and required partial cancellation as a condition to approval. Even *Shein's* case, so heavily relied upon by Appellees, required cancellation of the non-operated routes. Further, the "test of substantiality" as herein applied differs from that applied in *Gillette Motor Transport, Inc. — Control — Voss*, 93 MCC 765 and cases therein cited, as in those cases the "test of substantiality" as applied by the Commission required the cancellation of the non-operated routes. Such differing application of the test herein was arbitrary.

2. No finding was made on the contention of total dormancy as a matter of law, as required by Commission policy. *Stewart-Investigation of Operations*, 87 MCC 681, 697-8. Failure to so find resulted in arbitrary action on the part of the Commission. Appellees reply that the power to control does not render such

operation of Inland unlawful, but this does not consider the findings in the November 15, 1963 report of the Commission [J.S., p. 414, following A-42] "that the two carriers were unlawfully controlled and managed in a common interest."

3. Appellees contend that the application of the exception to the "split-off" doctrine under *Shein's* case was a reasonable policy determination within Commission discretion. Yet, it does not consider the arbitrary and capricious result thereof, since a precisely contrary result has been reached relating to the same Inland carrier in the *Yellow Transit* case. While the doctrine of stare decisis does not apply to the decisions of the Commission, consistency of its administrative rulings is essential, for to adopt different standards for similar situations is to act arbitrarily. *N. L. R. B. v. Mall Tool Co.*, 119 F. 2d 700; *Tallman v. Udall*, 324 F. 2d 411; *Dixie Highway Exp., Inc. v. U.S., et al.*, ... F. Supp. ...... Further, a collateral estoppal was created by the *Yellow Transit* case against Inland to contend contrary to the application of the "split-off" doctrine. *B. & O. R. Co. v. N. Y., N. H. & H. R. Co.*, 196 F. Supp. 724 (745).

4 Appellees contend that the reviewing court's determination is limited to determination of the existence of substantial evidence, but they do not consider that the principal issues herein are predicated upon Appellants' claim of arbitrary action resulting from procedural violations and non-adherence to pronounced policy by the Commission. Furthermore, the application of the exception in *Shein's* case herein contrary to

the Commission's fact finding in *Yellow Transit* case was arbitrary and capricious.

5. Appellees' contention that the "split-off" doctrine is not of continuing concern because "split-offs are therefore no longer a possible source of duplicate interstate operating rights" as a result of amendments to 49 U.S.C. 306 in 1962 (76 Stat. 911) terminating the automatic right of holders of intrastate certificates to use them for interstate transportation, is to ignore the effect of the amendment. Contrarily, such amendment breathed life into the interstate effect of such intrastate certificates so "split-off" from interstate rights and which had been registered with the Commission prior to the 1962 amendments by granting them "Certificates of Registration" as to interstate operations. Thus, Appellants herein, and others similarly so situated, holding intrastate rights became entitled as a matter of right and law to "Certificates of Registration" coextensive with the "split-off" interstate rights herein involved. Under the "split-off" doctrine of the Commission, the corresponding interstate rights theretofore "split-off" could not be transferred. The problem remains as to all of those rights "split-off" prior to the 1962 amendments. The large number of carriers affected by such "split-offs" is evidenced by the legislative history of such 1962 amendments, 2 *U.S. Code Congressional and Administrative News*, 87th Cong., Second Session, 1962, p. 3165 et seq. Such amendments cut-off the opportunity of "split-off" after 1962, but left those numerous "split-offs" occurring prior thereto to be dealt with under Commission precedents, such as in *Yellow Transit*,

and such issue is of continuing concern, as such operating rights are not terminable except on express statutory provision..

Other Substantial Grounds For Consideration By This Court.

The MOTION TO AFFIRM by Appellees The United States of America and the Commission failed to consider in any manner the other grounds in Appellants' JURISDICTIONAL STATEMENT submitted as substantial grounds for consideration of this case by this Court:

(1) In a prior decision involving the identical operating rights (the *Yellow Transit* case), the Commission refused to authorize the "split-off" of such identical rights to another carrier, and there the parties stood in the same position as applicants here. Appellees have ignored the *Yellow Transit* case, although the Commission's action in applying a different standard than previously applied on the same rights on proposed transfer to a different purchaser, constitutes the later action of the Commission as arbitrary.

(2) The order of June 29, 1963 waiving Rule 1.101 (e) [J.S. B-1] was arbitrary and void because it authorized reconsideration of the July 23, 1963 order, final under 49 U.S.C. §17(9) [J.S. B-8] and Rule 1.101 (a)(3) [J.S. B-1], upon the petition of applicants and not on the Commission's own volition.

(3) The Commission did not waive, nor was waiver by applicants sought of, Rule 1.101(a)(3) [J.S. B-1] with respect to the administrative finality of the order

of July 23, 1963 [J.S. A-40] nor Rule 1.101(f) [J.S. B-1, 2] with respect to the prohibition against consideration of a successive petition on the "same ground" as the petition previously denied by the order of July 23, 1963 [J.S. A-40].

(4) Applicants did not submit a new ground, but only the "same grounds" under such improperly granted petition, citing only the *Shein's* case, not previously cited by them and which was in derogation of the law of the case, the *Yellow Transit* case; and, therefore, the action of the Commission thereon was arbitrary and void as violative of its own rules. The mere citation of an additional case in support of a contention previously made does not constitute other than the "same grounds" but is merely additional argument on the "same grounds" already plowed.

(5) While conceivably the Commission might have reopened such administratively final order of July 23, 1963 on its own motion [*Baldwin v. Scott County Milling Co.*, 307 U.S. 478 (1939); *Sprague. v. Woll*, 122 F. 2d 128 (7 Cir. 1941), Cert. Den. 314 U.S. 669; and *Erie R. R. Co. v. United States*, 59 F. Supp. 743, 64 F. Supp. 162 (S. D. Ohio 1945)], the power of the Commission to so reopen is limited, under 49 U.S.C. §17 (6) [J.S. B-8] to reconsideration on the petition of a party only under "such general rules as the Commission may establish . . . ." Where, as here, the reconsideration was upon application of a party, in violation of the Commission's Rules 1.101(a)(3) and 1.101 (f), the reconsideration was arbitrary and void.

(6) The orders of the Commission of June 29, 1964

and October 20, 1964 are arbitrary, unreasonable, capricious, void, and constituted an abuse of discretion by the Commission, because:

(a) There had been an objectionable "split-off" of interstate and intrastate rights, which resulted in the creation of duplicate operating rights, and as a result thereof, the approval of the control of the operating rights herein would require proof of public convenience and necessity.

(b) There was no substantial evidence to support the finding that the operating rights sought to be controlled were not dormant. At most, such finding was predicated upon "the test of substantiality," not defined nor supported by reasonable rationale, and arbitrarily contrary to other applications of such "test".

(c) The grant of authority was not properly conditioned upon the cancellation of all operating authority sought to be controlled, except between San Antonio, Houston, Corpus Christi, Bishop, and Aransas Pass, Tex. Although these orders did not undertake to reverse the findings in the order of January 11, 1963, they did ignore the prior findings that the substance of the operations had been limited to operations between these named points [J.S. A-35, 36] but that no need existed to pass upon the question of whether a portion of the operating rights should be cancelled [J.S. A-37] because of the result therein reached of denial of the *control*

application. Hence, the result reached in these orders, not based upon adequate findings nor reasonable rationale, and contrary to the prior findings not set aside, and Commissions precedents, constituted the action as arbitrary, capricious and void.

(d) Total dormancy of the operating rights sought to be controlled existed as a matter of law because of the unlawful control by Central [J.S. 414, following A-42].

(e) The grant was not conditioned upon the cancellation of rights sought to be controlled which are duplicative with those of Central Freight Lines Inc., Southwestern Motor Transport, Inc., and Alamo Express, Inc., although applicants agreed thereto.

(f) They are predicated upon an inferential representation by Central Freight Lines Inc. that it would be successful in its lawsuit pertaining to the acquisition of control of Alamo Express, Inc., whereas in *Walker v. Central Freight Lines*, 382 S.W. (2d) 125 (San Antonio, Tex. Civ. App. 1964), Writ Denied, N.R.E., the issue of the acquisition of control by Central of Alamo Express has been finally adjudicated against Central by the Texas courts.

(g) They are predicated upon representation that there is no market for the interests unlawfully acquired in the carrier sought to be controlled,

although there is no evidence with respect thereto, nor as to what efforts have been made to market such interests.

(h) They are predicated upon a finding relative to negotiations relating to purchase of reversionary rights of the "split-off" intrastate rights coextensive with the interstate rights sought to be controlled, but there is no evidence with respect thereto.

(i) Applicants did not establish the statutory criteria required by 49 U.S.C. §5 for the approval of the control application, including failure to establish among other things, that the transaction is consistent with the public interest, the effect of the proposed transaction upon adequate transportation service to the public, that the total fixed charges resulting will not burden Central or Inland, that the interest of carrier employees will not be affected, or that full utility has been made of all operating rights. The record before the Commission was silent with respect to these requisite matters of proof.

It is manifest that the questions on which the decision of this cause depends are so substantial as to require further consideration by this Court.

WHEREFORE, Appellants pray that the Motion To Affirm by Appellees The United States of America and the Commission be denied and that this Court enter an appropriate order noting probable jurisdiction and that the case shall stand for argument.

Respectfully submitted,

REAGAN SAYERS
Third Floor, Century Life Bldg.
Fort Worth, Texas 76102
EWELL H. MUSE, JR.
415 Perry Brooks Bldg.
Austin, Texas 78701
Attorneys ofr Appellants

RAWLINGS, SAYERS, SCURLOCK & EIDSON
Of Counsel

CERTIFICATE OF SERVICE

I certify that I have served copy of the foregoing on all parties of record in compliance with Rule 33 of Revised Rules of this Court.

Dated at Fort Worth, Texas this 1st day of September, 1965.

REAGAN SAYERS